EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. [illegible]

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of

LEWIS N. MERRITT,

Bankrupt.

LEWIS N. MERRITT,

Appellant,

vs.

S. H. PETERS,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles

No.

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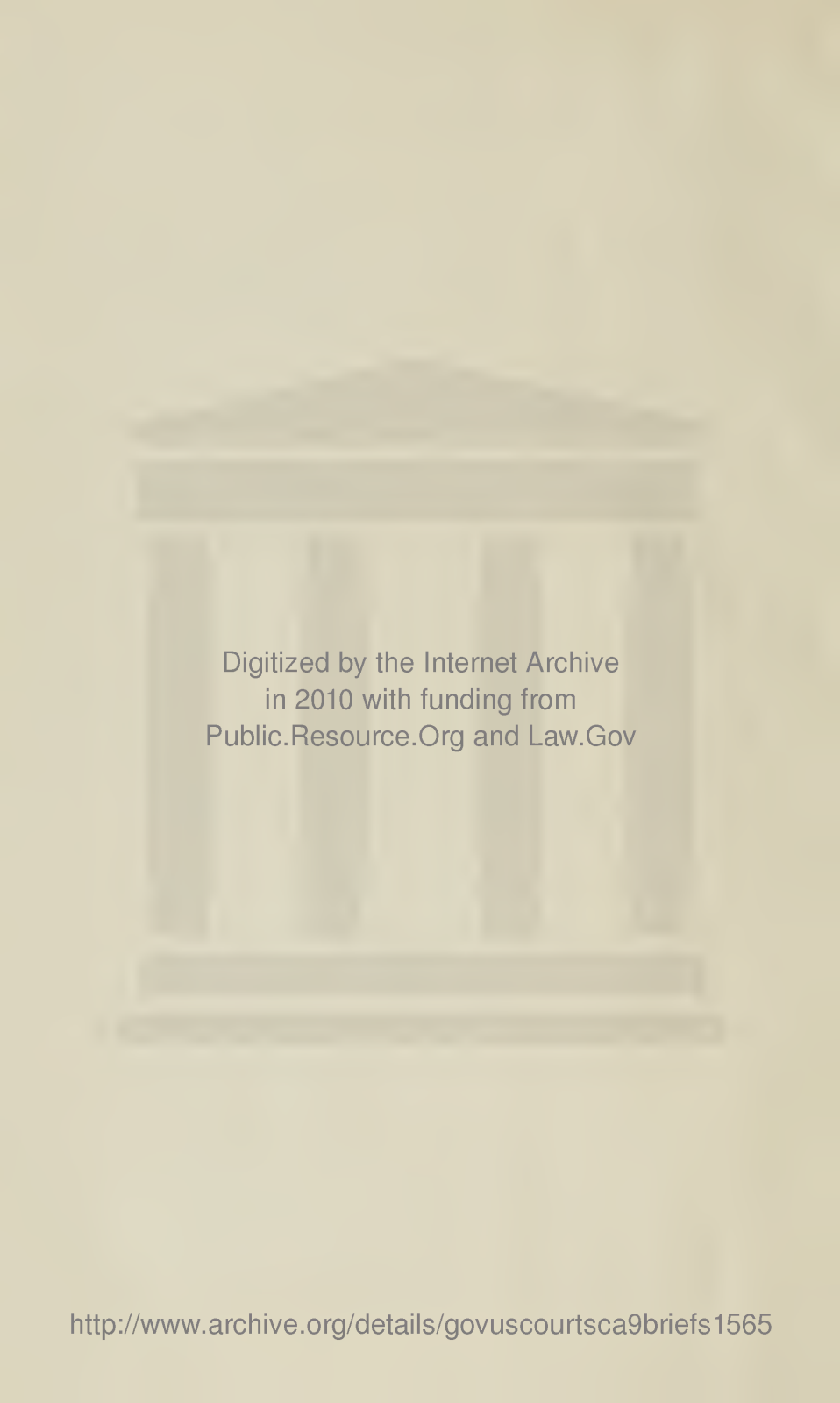

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Appellant:

NICHOLAS W. HACKER, Esq.,
Pacific-Southwest Building,
Pasadena, California.

For Appellee:

WILLIAM T. CRAIG, Esq.,
Board of Trade Building,
Los Angeles, California.

District Court of the United States
Southern District of California
Southern Division

IN THE MATTER OF LEWIS N. MERRITT,	No. 9569-J
Bankrupt.	IN BANKRUPTCY

At Los Angeles, in said District, on the 1st day of April, 1927, before the said Court in Bankruptcy, the petition of LEWIS N. MERRITT that he be adjudged bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy having been heard and duly considered, the said LEWIS N. MERRITT is hereby declared and adjudged bankrupt accordingly.

It is thereupon ordered that said matter be referred to James L. Irwin, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said LEWIS N. MERRITT shall attend before said referee on the 5th day of April, 1927, at his office in Los Angeles, California, at 2 o'clock afternoon, and thenceforth shall submit to such orders as may be made by said referee or by this Court relating to said matter in bankruptcy.

Dated, April 1, 1927.

Paul J. McCormick
District Judge.

[Endorsed]: No. 9569-J Bankruptcy. United States District Court Southern District of California Southern Division In the Matter of Lewis N. Merritt Bankrupt. In Bankruptcy. Adjudication and Order of Reference Filed Apr 1, 1927 at 20 min. past 12 o'clock P. M. R. S. Zimmerman, Clerk. B. B. Hansen, Deputy.

In the District Court of the United States
FOR THE SOUTHERN DISTRICT
OF CALIFORNIA
Southern Division
In Bankruptcy No. 9569-J.

IN THE MATTER OF
LEWIS N. MERRITT,
Bankrupt.

Referee's Certificate of Compliance.

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA

I, JAMES L. IRWIN, Referee in Bankruptcy, in charge of this proceeding, do hereby certify that the said Lewis N. Merritt, was on the 1st day of April 1927, adjudged bankrupt; that I have given notice of the hearing of the first meeting of creditors herein as provided by law, and said meeting was duly held on the 26th day of April, 1927, at which meeting the said bankrupt attended.

That the filing fees have been paid, and so far as appears from the records on file in my office, said bankrupt has conformed to the requirements of the Bankruptcy Act and has not committed any offense or done any of the acts which should be an objection to his discharge, and he is, in my opinion, so far as appears, entitled to his discharge.

Dated November 1st 1927

Earl E. Moss
Referee in Bankruptcy.

[Endorsed]: In the District Court of the United States For the Southern District of California southern Division In Bankruptcy No. 9569-J In the matter of Lewis N. Merritt. Bankrupt. Referee's Certificate of Compliance. Filed Nov 1 1927 at .... min. past 1 o'clock P m R. S. Zimmerman, Clerk B. B. Hansen Deputy James L. Irwin Referee in Bankruptcy 834 H. W. Hellman Bldg. Los Angeles, Cal.

Bankrupt's Petition for Discharge and Order Thereon
(Form 57)

In the District Court of the United States SOUTHERN District of CALIFORNIA.

In the Matter of LEWIS N. MERRITT Bankrupt.	}	In Bankruptcy Secs. 14 and 58 No. 9569-J

To the Honorable PAUL J. McCORMICK, Judge of the District Court of the United States for the Southern District of California.

Lewis N. Merritt, of Pasadena, in the County of Los Angeles and State of California in said district, respectfully represents that on the 1st day of April, last past, he was duly adjudged bankrupt under the Acts of Congress relating to bankruptcy; and that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the Court touching his bankruptcy.

Wherefore he prays that he may be decreed by the Court to have a full discharge from all debts provable

against his estate under said Bankruptcy Acts, except such debts as are excepted by law from such discharge.

Dated this 14th day of October, A. D. 1927.

Lewis N. Merritt,
Bankrupt.

Order of Notice Thereon

UNITED STATES OF AMERICA,
Southern District of California } ss

On this 14th day of October, A. D. 1927, on reading the foregoing petition, it is—

Ordered by the Court, that a hearing be had upon the same on the 5th day of December, A. D. 1927, before said Court, at Los Angeles in said District, at 10 o'clock in the forenoon; and that notice thereof be published in the LOS ANGELES NEWS, a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the Court, that the Referee shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable Wm. P. James, Judge of the said Court, and the seal thereof, at Los Angeles in said district, on the 14th day of October, A. D. 1927.

[SEAL] R. S. ZIMMERMAN, Clerk.
By B. B. Hansen, Deputy.

[Endorsed]: No. 9569-J. United States District Court, Southern District of California (Bankruptcy). In the matter of Lewis N. Merritt, bankrupt. Bankrupt's

Petition for Discharge and Order Thereon. Filed Oct. 14, 1927, at 40 min. past 1 o'clock P. M. R. S. Zimmerman, Clerk, B. B. Hansen deputy Harry M. Ticknor, Nicholas W. Hacker, attorney for petitioner, Pasadena.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION
IN BANKRUPTCY 9569-J

In the Matter of) LEWIS N. MERRITT,) Bankrupt.)	SPECIFICATIONS OF OBJECTION TO DISCHARGE OF BANKRUPT.

Comes now S. H. PETERS, a party in interest in the estate of the above named bankrupt and holding a provable claim against said bankrupt, and OBJECTS to granting the discharge of said bankrupt from his debts, and for the grounds of such opposition does file the following specifications, towit:—

SPECIFICATION NO. I.

That the said bankrupt, Lewis N. Merritt, while a bankrupt, did wilfully, wrongfully, feloniously, unlawfully, knowingly and fraudulently conceal from his Trustee in bankruptcy certain valuable personal property belonging to his estate in bankruptcy consisting of one Packard automobile and one Nash roadster automobile of the value of $3,200.00 or more, the registered title to which said automobiles stood in the name of the bankrupt at the time of his adjudication in bankruptcy, and which said automobiles were of the value of $3,200.00

or more, with a balance due on the purchase price thereof of $1,600.00; also a one-fourth interest of the said bankrupt in the following described paintings, towit:—

Four pictures painted by Taber,

Two pictures painted by DeLongpre, and

Two pictures painted by Knowles,

which said interest in said pictures was left to the bankrupt under the terms of the will of his Mother, Annette W. Merritt, and the exact value of which is to the Trustee at this time unknown.

That by reason of the premises, the bankrupt has committed one of the offences punishable by imprisonment, as specified in Section 29-B of the Bankruptcy Act of the United States, and by reason thereof should be denied his discharge.

SPECIFICATION NO. II.

That the said bankrupt Lewis N. Merritt on the 31st day of February 1927, before Clara E. Larison, a Notary Public within and for the County of Los Angeles and State of California, wilfully, unlawfully and feloniously, knowingly and fraudulently made a false oath in this bankruptcy proceeding, in that, having been duly sworn by the said Clara E. Larison, a Notary Public as aforesaid, to tell the truth regarding the facts contained in his schedules in bankruptcy, on said date did falsely, corruptly, knowingly, wilfully and contrary to said oath, verify a false statement in Schedule B-2-g of his bankruptcy schedules, in that the said bankrupt verified Schedule B-2-g as follows:—

"Carriages and other vehicles, viz: NONE." WHEREAS, in truth and in fact, at the time of making said schedules said bankrupt had in his possession a certain

Packard automobile and a certain Nash roadster automobile of the value of $3,200.00 on which the said bankrupt had paid the sum of $1,600.00, and that the said bankrupt, at the time of so verifying said schedule B-2-g on his oath, well knew that the statement in his schedules that he had no carriages and other vehicles was false, and that said statement was at that time made with the intention to deceive and mislead his Trustee in bankruptcy, and that by reason of the premises the bankrupt has committed one of the acts punishable by imprisonment, as specified by Section 29-B of the Bankruptcy Act of the United States, and by reason thereof should be denied his discharge.

SPECIFICATION NO. III.

That said Lewis N. Merritt, while a bankrupt, on the 24th day of May 1927, before the Honorable James L. Irwin, one of the Referees in bankruptcy for the Southern District of California, and the Referee in charge of this proceeding, at the examination of said bankrupt, did then and there wilfully, unlawfully, feloniously, knowingly and fraudulently make a false oath, in that the said bankrupt, having been duly sworn by the said Honorable James L. Irwin, Referee in bankruptcy as aforesaid, to tell the truth, the whole truth and nothing but the truth, and under his oath to testify on said date, did falsely, corruptly, knowingly, feloniously and wilfully, and contrary to said oath, swear and depose before the said Referee, in response to the following questions, towit:—

"By Mr. Lewis.

Question: Have you any automobiles?

Answer: No.

Q. Does anybody hold title to any automobiles for you?

A. I am buying two automobiles on lease contract.

Q. Showing you a paper here—what has become of this automobile?

A. That is in the hands of the automobile agency.

Q. What automobile agency is it in the hands of?

A. Earl C. Lindley Motor Car Co."

That such questions and answers just referred to are found in the transcript of the testimony taken on said examination, on page 34 thereof; that said answers made by the said bankrupt to all said questions were false, in that the said bankrupt did have two (2) automobiles at the time of so testifying, and that said automobiles were not in the hands of the Earl C. Lindley Motor Car Co., but were at that time in the possession of the bankrupt; and that, at the time of so swearing, the bankrupt did not believe said answers to be true; that said answers were made with the wilful intent to deceive and mislead the Trustee and creditors of said bankrupt as to material facts which the creditors had a right to inquire about; and that, by reason thereof, the bankrupt committed one of the acts punishable by imprisonment, as specified by Section 29-B of the Bankruptcy Act of the United States, and for that reason should be denied his discharge.

Your petitioner further alleges that the concealment of the property hereinbefore alleged and the false oaths committed by the said bankrupt in his bankruptcy proceeding were knowingly and fraudulently done by said bankrupt with intent to hinder, delay and defraud his creditors.

WHEREFORE, Your petitioner prays that the petition of the said bankrupt for his discharge in bankruptcy be DENIED.

DATED: At Los Angeles in the Southern District of California, this 23rd day of November, 1927.

S. H. Peters
Objecting Creditor.

W. T. Craig
Attorney for Objecting Creditor.

United States of America
Southern District of California
Southern Division
County of Los Angeles
} ss.

S. H. Peters being duly sworn says: That he is Objecting creditor in the foregoing entitled matter; that he has read the foregoing Specifications of Objection to Discharge of Bankrupt and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes them to be true.

S. H. Peters

Subscribed and sworn to before me this ..... day of November A. D. 1927

[Notarial Seal] Olive Diffenderfer
Notary Public in and for the County of Los Angeles, State of California

[Endorsed]: Original No. 9569-J In United States District Court Southern District of California Southern Division In the matter of Lewis N. Merritt Bankrupt Specifications of Objection to Discharge of Bankrupt Filed Nov. 28, 1927 at 50 min. past 2 o'clock P. M. R. S. Zimmerman clerk, B. B. Hansen deputy. W. T. Craig 817 Board of Trade Bldg. Los Angeles, California Attorney for Objecting Creditor

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

In the Matter of	)	In Bankruptcy
LEWIS N. MERRITT,	)	
Bankrupt	)	No. 9569-J.

REPORT OF SPECIAL MASTER ON DISCHARGE

TO THE HONORABLE WILLIAM P. JAMES, ONE OF THE JUDGES OF THE UNITED STATES DISTRICT COURT:

I, the undersigned, James L. Irwin, one of the Referees in Bankruptcy for the County of Los Angeles, to whom by order of the court herein duly entered on the 5th day of December, 1927, Bankrupt's Petition for Discharge, and the Specifications of Objection of S. H. Peters, Objecting Creditor, of his grounds of opposition thereto, have been referred to find the facts and state the law and my recommendation, do hereby report as follows:

Upon receipt of the Order of Reference to me herein, and the pleadings and papers on file, and upon notice to the parties to appear and attend before me, said parties, to-wit, T. S. Tobin, Esq., appearing for the Objecting Creditor; Howard S. Lewis, Esq., appearing for the White Realty Company, a Creditor; and Nicholas W. Hacker, Esq., and Harry M. Ticknor, Esq., appearing for the Bankrupt; due hearing was had on the following

days, to-wit, December 29th and 30th, 1927, and testimony and other evidence were taken before me; whereupon I do find the following to be the facts, to-wit:

That the Bankrupt herein filed his schedules in bankruptcy and omitted therefrom two automobiles, which he held on lease contract; and also a one-fourth interest in four paintings which were bequeathed to him by the will of his mother, but which paintings were to remain in the possession of his father as long as the father lived, and the father of the said Bankrupt is still living and has possession of said paintings; that said paintings are of a problematical and sentimental value, and it is doubtful if the one-fourth interest of the Bankrupt in said paintings has any actual value.

That said automobiles were held under lease contract, and on different occasions, prior to the filing of the petition in bankruptcy, had been repossessed by the legal owner thereof, because the Bankrupt had not kept up his payments thereon; that shortly prior to the Bankruptcy the payments were delinquent and the cars were repossessed by the legal owner thereof; that the Bankrupt did not schedule his equity in said automobiles, acting upon the advice of his attorney; that at the first meeting of creditors, when asked concerning said automobiles, the Bankrupt stated the facts concerning them; and his then attorney asked leave to amend the schedules, which was granted; that the Trustee in Bankruptcy made no effort to get possession of said automobiles; that the legal owner retained possession of them and no demand was made upon him by the Trustee for the possession of them; that approximately a month subsequent to the first meeting of creditors, the legal owner

not having disposed of said automobiles, the Bankrupt borrowed sufficient money to pay the delinquent payments on said automobiles and was again given possession of them, which he retained some months, paying in all approximately One Thousand Dollars since having filed his Petition in Bankruptcy; that the Trustee then secured a turn-over order and obtained possession of the automobiles and finally disposed of them, realizing therefrom approximately the amount the Bankrupt had paid on them since filing his Petition in Bankruptcy, and since his last purchase of them.

I do therefore find that at the time of the filing of the Petition in Bankruptcy the Bankrupt's equities in said machines were of no value, and that his failure to schedule said machines, and his interest in said paintings, was upon the advice of his attorney, and not with the intent to delay and defraud his creditors.

I do therefore recommend that said Specifications be overruled, and that said Bankrupt's discharge be granted.

My fees and expenses on said reference are $50.00 and disbursements $82.00 for stenographic reporter and transcript.

I transmit to you herewith the following documents:

1. Specifications of Opposition to Discharge of Bankrupt.
2. Notice of Hearing.
3. Order of Reference.
4. Oath of Special Master.

4.a Summons and return.

5. Reporter's Transcript of Testimony.
6. Specifications of Objections.

7. Notice of Trial.

Dated this 30 day of Jan. 1928.

Respectfully submitted,

James L. Irwin,

Special Master.

Filed Feb. 1 1927 at 45 Min. Past 4 o'Clock P. M. R S Zimmerman, Clerk By B. B. Hansen, Deputy

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IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION IN BANKRUPTCY 9569-J

In the Matter of) LEWIS N. MERRITT,) Bankrupt.)	EXCEPTIONS TO REPORT OF MASTER.

TO THE HONORABLE WM. P. JAMES, JUDGE OF THE ABOVE NAMED COURT:—

Comes now S. H. Peters, objecting creditor to the discharge of the bankrupt herein, and makes and files the following EXCEPTIONS to the findings of James L. Irwin, Esq., Special Master herein, made and entered on January 30th, 1928, for the reason that said findings are not justified by the evidence, are contrary to the evidence, and contrary to the law, and that the conclusions to be drawn therefrom are contrary to Section 14 and Section 29 of the Bankruptcy Act of the United States, and particularly to Section 14-B-7 thereof.

EXCEPTION I.

The objecting creditor EXCEPTS to the finding of the Master

"that said automobiles were held under lease contract and on different occasions prior to the filing of the petition in bankruptcy had been re-possessed by the legal owner thereof because the bankrupt had not kept up his payments thereon; that shortly prior to the bankruptcy the payments were delinquent and the cars were re-possessed by the legal owner thereof,"

for the reason that the testimony of the bankrupt himself shows that at the time of filing his petition in bankruptcy the bankrupt was in possession of said automobiles, and the testimony further shows that the payments on said automobiles were not at that time delinquent but, on the contrary, had been paid up to April 5th, 1927, towit: six days subsequent to the filing of the petition in bankruptcy.

EXCEPTION II.

The objecting creditor EXCEPTS to the finding of the Master

"that the bankrupt did not schedule his equity in said automobiles, acting upon the advice of his attorney,"

for the reason that the evidence offered by the bankrupt in support of his defense that he acted upon advice of his attorney was insufficient to justify said finding, for the reason that the bankrupt was unable to state any of the conversation between himself and the person whom he claimed was his attorney, and for the further reason that no showing was made that the bankrupt fully and fairly stated the facts to the person whom he claims was his attorney, and for the further reason that the attorney whom he claims he consulted was not an attorney in this proceeding and, so far as the objecting creditor knows, was not then an attorney of this Court.

EXCEPTION III.

The objecting creditor EXCEPTS to the finding of the Master

"that approximately a month subsequent to the first meeting of creditors, the legal owner not having disposes of said automobiles, the bankrupt borrowed sufficient money to pay the delinquent payments on said automobiles and was again given possession of them, which he retained some months, paying in all approximately $1,000.00 since having filed his petition in bankruptcy;"

for the reason that said finding does not include a finding of fact to the effect that in paying up said delinquent installments the bankrupt made use of a credit of over $2,100.00 which he had paid on said automobiles prior to the filing of the petition in bankruptcy as a part of the purchase price of said automobiles.

EXCEPTION IV

The objecting creditor EXCEPTS to the finding of the Master which reads as follows:—

"I do therefore find that at the time of the filing of the petition in bankruptcy the bankrupt's equities in said machines were of no value and that his failure to schedule said machines and his interest in said paintings was on the advice of his attorney and not with intent to delay and defraud his creditors,"

for the reason that the evidence conclusively shows, and is undisputed, that prior to the filing of his petition in bankruptcy herein the bankrupt had paid on said automobiles a sum of money in excess of $2,100.00; that said sum was at all times subsequent thereto left to the credit of and for the benefit of said bankrupt, and at the time the bankrupt took possession of said automobiles after

the filing of his petition in bankruptcy, no new contract was made thereon and payments made subsequent to the filing of said petition in bankruptcy were credited onto and in addition to the sum of over $2,100.00 which the bankrupt had paid on said automobiles prior to the filing of his petition herein.

The objecting creditor further EXCEPTS to said finding for the reason that the acts, conduct and attitude of the bankrupt in said transaction were not in good faith but clearly showed an intent to hinder and delay the Trustee in obtaining possession of said automobiles and to defraud him out of over $2,150.00 which the bankrupt had theretofore paid on the purchase price thereof.

EXCEPTION V.

The objecting creditor EXCEPTS to said Findings as a whole, for the reason that the specifications of objection to the bankrupt's discharge contained, in addition to the concealment alleged, two charges of false swearing wherein the bankrupt was charged in Specification No. II with falsely swearing in his schedules that he had no carriages and other vehicles, and in Specification No. III with falsely swearing on his examination that he had no automobiles; whereas, in truth and in fact, at the time of filing his petition in bankruptcy he had two automobiles, and at the time of the examination, on which the charge of false swearing in Specification No. III was based, the bankrupt was at that time driving one of said automobiles; that this Fifth EXCEPTION is based on the fact that on the trial of the objections to discharge the objecting creditor proved conclusively that said false testimony was given by the bankrupt at the

times alleged in said Specifications, and that the Master has made no findings whatsoever relative to said false swearing.

WHEREFORE, the objecting creditor prays that the report of the Special Master be set aside and the bankrupt's discharge DENIED.

S. H. Peters
Objecting Creditor.

W. T. Craig
Attorney for Objecting Creditor.

United States of America
Southern District of California
Southern Division
County of Los Angeles
} ss.

S. H. Peters being duly sworn says: That he is Objecting Creditor in the foregoing entitled matter; that he has read the foregoing Exceptions to Report of Referee and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes them to be true.

S. H. Peters

Subscribed and sworn to before me this 9th day of February A. D. 1928

[Notarial Seal] Olive Diffenderfer
Notary Public in and for the County of Los Angeles, State of California

[Endorsed]: Original No. 9569-J In United States District Court Southern District of California Southern Division In the matter of Lewis N Merritt Bankrupt Exceptions to Report of Referee Filed Feb. 10, 1928 at 25 min. past 2 o'clock P. M R. S. Zimmerman, clerk.

B. B. Hansen, deputy. W. T. Craig Board of Trade Building, Telephone TRinity 5531 Los Angeles, California Attorney for Objecting Creditor

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
Before Hon. James L. Irwin, Special Master

In the Matter of)
LEWIS N. MERRITT,) In Bankruptcy,
Bankrupt) No. 9569-J.

REPORTER'S TRANSCRIPT OF HEARING OBJECTIONS TO DISCHARGE, DECEMBER 29th AND 30th, 1927, BEFORE THE SPECIAL MASTER

BE IT REMEMBERED, That upon the hearing of the above entitled matter, before Hon. James L. Irwin, Special Master, 834 H. W. Hellman Building, Los Angeles, California, on the 29th and 30th days of December, 1927, there appeared T. S. TOBIN, ESQ., on behalf of W. T. CRAIG, ESQ., Attorney for the Objecting Creditor, HOWARD S. LEWIS, ESQ., for the W. H. White Realty Company; NICHOLAS W. HACKER, ESQ., and HARRY M. TICHNOR, ESQ., appearing for the Bankrupt; whereupon the following proceedings were had and testimony was adduced, to-wit:

(Testimony of Clara E. Larison—E. B. Bowman.)

CLARA E. LARISON,

a witness called on behalf of the Objecting Creditor, being duly sworn by the Special Master, testified as follows:

My name is Clara E. Larison. I am a Notary Public in the State of California, within and for the County of Los Angeles. I know the Bankrupt, Lewis N. Merritt, who subscribed and swore to the Petition and schedules filed herein before me on the 31st day of March, 1927.

E. B. BOWMAN,

witness for Objecting Creditor, testified: I am now and was on May 24th, 1927, and June 7th, 1927, respectively, Court Reporter for Honorable James L. Irwin, Referee in Bankruptcy. I attended as such Reporter an examination of Lewis N. Merritt held before the Referee in Bankruptcy on the 24th day of May, 1927, and also on the 7th day of June, 1927. Mr. T. S. Tobin appeared as attorney for the Trustees; Mr. Howard S. Lewis for the Creditor, and Nicholas W. Hacker for the Bankrupt. I took down the testimony of the Bankrupt as examined by Mr. Lewis, at each of these hearings. The carbon copies shown me are true and correct.

(Reporter's transcript of testimony of the Bankrupt had upon May 24th, 1927, offered for identification as Trustee's Exhibit No. 1, and so marked. A similar transcript of such examination held on June 7th, 1927, offered and marked Trustee's Exhibit No. 2, for identification.)

(Testimony of Earl C. Lindley.)

EARL C. LINDLEY,

witness produced on behalf of Objecting Creditor, testified:

I am President of the Lindley Motor Car Company, and acquainted with the Bankrupt, Lewis N. Merritt. On or about the 5th of October, 1926, I sold to Mr. Merritt one Nash Advanced Six Roadster, and a Packard seven-passenger Sedan. The down payment on the Packard car was one-third of the sales price or $651.00. The monthly payments were $81.38, commencing in November, 1926, and running for 18 months. The down payment on the Nash roadster was approximately one-third and the monthly payments were about the same on the Nash as on the Packard.

On May 24th, I am not sure as to the date, but these cars were in our warehouse, stored. They were repossessed by Mr. Butler of our collection department. I think that he took them about the 15th to the 20th of April. They remained in our warehouse about a month. I am not able to say it was a month. The payments were brought up to date and the cars were turned back to Mr. Merritt. I cannot say whether they were turned back prior to the 24th of May, 1927, or not. The paper on these cars was sold to the Commercial Discount Company about a week after the sale, and they kept all the records.

Witness temporarily withdrawn.

(Testimony of Frank McDonald.)

FRANK McDONALD,

witness on behalf of Objecting Creditor, testified:

I am collector and adjustor for the Commercial Discount Company. We purchased two conditional sales contracts from the Lindley Motor Company of Pasadena in October, 1926, in which Lewis N. Merritt was the purchaser and Lindley Motor Company was the seller. I have no copy of the contracts with me. The original was in our office but when the contracts were paid up sometime ago they were turned over on receipt of the payments.

I have had dealings with Lewis N. Merritt during the past year. I believe we re-possessed two cars from him on two different times. One was a Nash roadster and the other was a Packard sedan. First time was in the latter part of May, somewhere between the 20th of May and the latter part of May, I cannot give the exact date.

I do not believe there is anybody at the Commercial Discount Company had anything to do with the contracts but myself and to the best of my recollection the car was repossessed sometime right after the 20th of May. When an account becomes delinquent there is a write-up made, that is, a statement, and the date put on when I repossessed the car. I have three dates here,—the first one is 5/16/27; I have no notation as to that date. The second is the 26th. To the best of my recollection it was between the 20th and the latter part of the month. I think it was the 26th and the Nash car was re-possessed on the same date. They were in the Lindley Motor Company warehouse when I repossessed

(Testimony of Earl C. Lindley.)

them. They were there a month before. I cannot say how long they remained there. I saw them there probably a week after that.

There was a bad check that came into my office from Mr. Merritt on those cars. It came into my office in April.

I again re-possessed these cars in October.

When they were delivered to the Trustee he paid up the balance due on the cars; how much I do not know.

EARL C. LINDLEY,

recalled:

The two automobiles were placed in my place of business in April, 1927, by Mr. Butler, our collector. They remained there a month, or maybe more and then one of them was delivered to Mr. Merritt's son and one to Mr. Merritt, the Bankrupt. They came back into the possession of the Earl Lindley Motor Company on the 13th of October. They were re-possessed for delinquent payments, either by Mr. McDonald or by Mr. Butler. As far as I know, from the latter part of May or around the first of June they were in the hands of Mr. Merritt until October 13th, and they were then turned over to the Trustee in Bankruptcy. I do not know the balance owing on them as I had nothing to do with the collections. In June they were turned back to Mr. Merritt as he paid up. At that time he was behind two payments,—those falling due on the 5th of April and the 5th of May.

(Testimony of Lewis N. Merritt.)

LEWIS N. MERRITT,

the Bankrupt, testified:

I remember being examined in this Court on May 24th by Mr. Lewis, representing certain creditors. I came down-town in a car. I am not sure what car.

Thereupon the Counsel for Objecting Creditor offered in evidence as a part of the case of the Objecting Creditor, a part of the transcript of the testimony of the Bankrupt, given May 24th, 1927, before the Referee, being part of Trustee's Exhibit No. 1:

"Q, BY MR. LEWIS: In fact, you know you didn't, don't you?

"A: No, I do not.

"Q: Have you any automobiles?

"A: No.

"Q: Does anybody hold title to any automobiles for you?

"A: I am buying two automobiles on lease contract.

"Q: Showing you a paper here; what has become of this automobile?

"A: That is in the hands of the automobile agency.

"Q: What automobile agency is it in the hands of?

"A: Earl C. Lindley Motor Car Company.

"Q: How much do you owe on it?

"A: About $1600.

"Q: What kind of car is it?

"A: A Packard.

"Q: What did you pay for it?

"A: About $3200.00.

"Q: Are you driving that car?

"A: I am.

(Testimony of Lewis N. Merritt.)

"Q: Have you got it with you today?

"A: No.

"Q: Where is it?

"A: In Pasadena.

"Q: What other automobiles have you?

"A: I have a Nash Roadster—my son uses.

"Q: A Nash Roadster that your son uses?

"A: Yes.

"Q: Where did you get that?

"A: I bought that from Earl C. Lindley."

"Q: Don't you know how much you paid for the two cars?

"A: No, not exactly.

"Q: Do you use them both?

"A: No, I don't use the Roadster at all.

"Q: Who uses the Roadster?

"A: My son.

"Q: Who holds the two cars?

"A: The Lindley Motor Car Company, or their assigns.

"Q: You have no interest in them at all?

"A: I have no claim on them.

"Q: Who is the registered owner of those cars?

"A: The Earl C. Lindley Motor Car Company.

"Q: Who is the legal owner?

"A: I mean the legal owner.

"Q: Who is the registered owner?

"A: I am.

"Q: You did not schedule those cars?

"MR. HACKER: That is objected to, because it is covered by the amended schedules.

(Testimony of James E. Price—William H. Moore, Jr.)

"THE REFEREE: The objection is overruled.

"A: No."

JAMES E. PRICE,

Called on behalf of Objecting Creditor, testified:

I am an adjustor for William H. Moore, Trustee in Bankruptcy, of the Estate of Lewis N. Merritt, Bankrupt.

I got two automobiles from the Earl Lindley Motor Co. during the month of December, 1927. One was a 1926 Nash Roadster and the other was a Packard sedan, 1926 model. I do not know in whose name they were registered. They were sold by the Trustee *by the Trustee* in his office at public auction. The Packard was worth from $1200.00 to $1500.00, and the Nash about $900.00.

I brought them to a garage Mr. Moore designated, put them in there and had them wiped up.

WILLIAM H. MOORE, JR.,

Called as a witness on behalf of the Objecting Creditor, testified:

I am the Trustee in Bankruptcy in this matter and I filed Trustee's Petition and Order to Show Cause, dated October 5th, 1927, and October 26th, 1927, respectively, as follows:

TO THE HONORABLE JAMES L. IRWIN, REFEREE IN BANKRUPTCY:—

Comes now your petitioner, Wm. H. Moore, Jr., and respectfully shows the Referee:—

(Testimony of William H. Moore, Jr.)

I.

That the above named Bankrupt Lewis N. Merritt was adjudged a bankrupt in this court on the 31st day of March, 1927, and that your petitioner was elected Trustee in bankruptcy for the estate of the said Lewis N. Merritt, bankrupt, and at all times since has been and now is the duly qualified and acting Trustee in bankruptcy for said estate.

II.

That among the assets belonging to the estate of the bankrupt herein are certain valuable paintings, specifically set forth in paragraph four of the will of Annette W. Merritt, made, executed and published on May 5th, 1923, and filed for probate in the Superior Court of Los Angeles County, California, on July 11th, 1923, which said paintings consist of four (4) pictures painted by Taber, two (2) by DeLongpre, and two (2) by Knowles, and which said paintings were to be divided equally between the bankrupt herein and his brother Hulett C. Merritt and his sisters Bertha M. White and Evelyn M. Hanan.

III.

That the said bankrupt failed, neglected and refused to include said pictures in his schedules in bankruptcy and that his ownership of said pictures was developed at an examination of said bankrupt held before the Honorable James L. Irwin, Referee in bankruptcy, on May 24th, 1927, and June 7th, 1927.

IV.

That said bankrupt has failed, neglected and refused to turn over to your petitioner as Trustee in bankruptcy any of the pictures hereinbefore described, which said

(Testimony of William H. Moore, Jr.)
pictures your petitioner believes to constitute a valuable portion of the assets of the bankruptcy estate.

V.

That at the time of the filing of his petition in bankruptcy herein the said bankrupt Lewis N. Merritt was the owner of an equity in a certain Packard automobile of the value of $3,200.00 on which there was a balance due of $1,600.00; that he failed and neglected to include said automobile in his schedules in bankruptcy; that at the time of the examination of the said bankrupt on May 24th, 1927, he was driving said automobile and keeping it in Pasadena, California; that he was also the owner of a Nash roadster, the exact value of which is to your petitioner unknown; that the said bankrupt Lewis N. Merritt has failed, neglected and refused to surrender said automobiles to your petitioner as Trustee in bankruptcy for the purpose of realizing such sums as he might be able to do on the bankrupt's equity therein.

VI.

That your petitioner believes that it is to the best interests of the bankrupt estate that the bankrupt be required forthwith to turn over to the Trustee the property hereinbefore described to your petitioner as Trustee in bankruptcy, to be sold for the benefit of the bankrupt estate.

WM. H. MOORE, JR.
Trustee.

W. T. CRAIG
Attorney for Trustee
10-4-27.

(Testimony of William H. Moore, Jr.)

Vertified October 5th, 1927; filed October 6th, 1927. James L. Irwin, Referee.

ORDER TO SHOW CAUSE, as follows:

Upon reading and filing the verified petition of Wm. H. Moore, Jr., Trustee in bankruptcy for the above named estate, and it appearing to the Referee from said petition that said bankrupt Lewis N. Merritt is concealing certain personal property from his Trustee in bankruptcy, consisting of certain valuable paintings, specifically described in the petition of the Trustee in Bankruptcy herein, together with a Packard automobile and a Nash roadster automobile, and good cause appearing therefor, and the Referee being fully advised in the premises,

NOW THEREFORE, On motion of W. T. Craig, (Thomas S. Tobin of counsel) Attorney for the Trustee,

IT IS ORDERED That Lewis N. Merritt, the bankrupt herein, show cause herein before the undersigned Referee in bankruptcy at the Courtroom of the Honorable James L. Irwin, Referee in bankruptcy, in the H. W. Hellman Building in the City of Los Angeles, County of Los Angeles, and Southern District of California on the 14th day of October, 1927, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, why the prayer of the Trustee herein should not be granted and the bankrupt Lewis N. Merritt be required to turn over to Wm. H. Moore, Jr., as Trustee in bankruptcy herein the property described and set forth in the petition of the said Trustee herein.

(Testimony of William H. Moore, Jr.)

IT IS FURTHER ORDERED That a copy of this order and the petition upon which the same is based be served upon the bankrupt Lewis N. Merritt at least five (5) days prior to the hearing hereon.

DONE at Los Angeles in the Southern District of California, this 6th day of October, 1927.

EARL E. MOSS
Referee in Bankruptcy.

Service of the within order is hereby admitted this 8th day of October, 1927.

(Signed)
N. W. HACKER
H. M. TICHNOR
Attorneys for Bankrupt.

Filed October 18th, 1927.

JAMES L. IRWIN, Referee.

MR. LEWIS: If the Court please, Mr. Lindley desires to be excused, if he is not needed further.

THE SPECIAL MASTER: There are just one or two questions that I would like to ask him before he goes. It will not be necessary for him to resume the stand. Mr. Lindley, at the time you took possession of these automobiles a short time prior to the filing of the petition in bankruptcy in this case, was there any conversation between you and Mr. Merritt, the Bankrupt, about the turning over or of turning them back to him after the bankruptcy discharge was granted to him.

A: I can't recall anything.

Q: In other words, did you re-possess these automobiles without any understanding as to how you were

(Testimony of William H. Moore, Jr.)
to use them, or without any conversation with him as to how you were to use them?

A: Yes, we did.

Q: And if a purchaser had come along the next day, you would have sold them to him?

A. Yes sir, in the case of either car.

THE SPECIAL MASTER: That is all. Do you gentlemen want to ask him anything further?

MR. TOBIN: No.

MR. HACKER: No.

Thereupon counsel for Objecting Creditor offered in evidence Order to Convey Assets to the Trustee, which is as follows:

Wm. H. Moore, Jr., The Trustee herein, having made an application to compel Lewis N. Merritt to turn over to his said Trustee certain paintings bequeathed to said bankrupt in the will of his mother, Annette W. Merritt, deceased, also a Packard automobile and a Nash roadster, and an Order to Show Cause having been set for hearing before the undersigned Referee in Bankruptcy at the court-room of the Honorable James L. Irwin in the H. W. Hellman Building in the City of Los Angeles, County of Los Angeles, Southern District of California, on the 14th day of October, 1927, at the hour of 10:00 o'clock A. M., and having been continued to the 18th day of October, 1927, at the hour of 2:00 P. M., and the Trustee appearing by W. T. Craig (Thomas S. Tobin of counsel) his attorney, and the bankrupt appearing in person and by his attorney, N. W. Hacker, and testimony having been taken at said hearing, and it appearing to the Court from the testimony taken at said hear-

ing that sometime prior to the filing of the Petition in Bankruptcy that said bankrupt had purchased a Packard automobile for the agreed price of Three Thousand Two Hundred ($3200.00) Dollars, and a Nash roadster automobile, the value of which is unknown, from Earl Lindley Motor Co., of Pasadena, California, which said automobiles were not included by said bankrupt in his schedules in bankruptcy at the time of the filing of the same. That at the first meeting of the creditors informal application was made by the bankrupt through his attorney to amend his schedules to include said automobiles, with the statement that the same had been re-possessed by the Earl Lindley Motor Co. That thereafter an order was duly entered herein by the Honorable James L. Irwin, permitting the said bankrupt's schedules to be amended to include said automobiles. That on or about the first day of July, 1927, said bankrupt reacquired possession of said automobiles and made payments on account of the purchase price thereof to said Earl Lindley Motor Co., and that later, on or about the 8th day of October, 1927, said bankrupt being in default with said Earl Lindley Motor Co., the said Earl Lindley Motor Co. again re-possessed said automobiles, and still retains possession thereof, that said automobiles are out of the possession of said bankrupt.

It appearing to the Referee that under the terms of the will of Annette W. Merritt the bankrupt is entitled to one-fourth of the following described paintings:

Four pictures painted by Tabor,

Two pictures painted by DeLongpre, and

Two pictures painted by Knowles.

Under the terms of said will the four children of said Annette W. Merritt were entitled to select in the order of their ages from said eight paintings, and that said bankrupt has third choice thereof, but that said choice could not be made, nor any possession of said paintings be taken until after the death of the father of the bankrupt Lewis J. Merritt, who is still living. That the trustee is entitled to the interest of said bankrupt in said property.

NOW THEREFORE, on Motion of W. T. Craig, attorney for the trustee in Bankruptcy (Thomas S. Tobin of Counsel) it is ordered that said Lewis N. Merritt, bankrupt herein, forthwith convey to Wm. H. Moore, Jr., as Trustee in bankruptcy herein, all of his right, title and interest in and to one Packard automobile and one Nash roadster automobile, the same being now in the possession of Earl Lindley Motor Co. of Pasadena, California, and all of his right, title and interest in and to the paintings hereinbefore described.

Done at Los Angeles, in the Southern District of California this 17th day of November, 1927.

EARL E. MOSS

Referee.

THE SPECIAL MASTER: Is the question of these automobiles the only objection to the discharge?

MR. TOBIN: That and the perjury, and the concealment of the fact that he had a one-fourth interest in some paintings that were left him in his mother's will.

THE SPECIAL MASTER: The question of value at the time the automobiles were sold is not material, be-

cause there were some payments made during the time he was in possession of them.

MR. HACKER: That is true. The value of them at the time of the filing of the petition in bankruptcy is material, and there were some payments made in the meantime.

MR. TOBIN: Yes.

THE SPECIAL MASTER: And the material question is what equity did the bankrupt have in the automobiles at the time of the filing of the petition in bankruptcy.

MR. TOBIN: There would be a continuing concealment.

MR. HACKER: No, not after the bankruptcy schedules were filed.

MR. TOBIN: It is the duty of the bankrupt to turn over to his Trustee all the property in his possession; but by deceiving the Trustee and keeping them and driving them, and having them in his possession, instead of turning them over to his Trustee, he has committed an offense against the Bankruptcy Act, and it is a continuing concealment.

THE SPECIAL MASTER: I am trying to indicate what the Court thinks is material. I am afraid we are wasting time. The value of the automobiles is material, and also any agreement he might have had with Mr. Lindley whereby he was to later come into possession of the automobiles would be a material and proper issue.

(Testimony of William H. Moore, Jr.)

Witness resuming:

I obtained possession of the two automobiles,—one was a Packard sedan and the other was a Nash roadster, and disposed of them. I sold the Packard for $1250.00 and the Nash roadster for $800.00.

CROSS EXAMINATION:

I was elected Trustee on the 27th day of April, which was the first meeting of the creditors. I employed W. T. Craig as counsel. I have not been in Court in this matter, personally, until today.

I heard that a question was raised with respect to these two automobiles and that a motion was made by the Bankrupt's attorney for leave to amend the schedules to include them in the schedules, but do not remember whether that was at the first meeting or at an adjourned meeting, nor do I know whether it was before the Bankrupt was examined or offered for examination.

I knew of the existence of these automobiles either through Mr. Tobin or one of Mr. Craig's assistants telling me that the matter had resulted in a discovery of the automobiles that were not scheduled, but there was nothing for me to do, because they had been repossessed by the seller. I took no action to find out whether that was true or not until October because I did not know that Mr. Merritt had them in the meantime. I made no investigation as to whether he had or not. I relied on my attorney's statement. I did not read the transcript of the testimony. I got information from my attorney. My information was that they were not in the possession of the bankrupt nor in the hands of the financing company, but had been turned over after he

(Testimony of William H. Moore, Jr.)

had been ordered in for examination. It was my understanding they had been re-possessed after the filing of the petition, but I took no steps to obtain possession or assert any rights as Trustee until October of this year.

I did not see the answer filed by Mr. Merritt in response to the Order to Show Cause why these cars should not be turned over. It was never served upon me.

I have seen the Amended Schedule B-4, signed by Mr. M. Merritt, and I think I received a copy of it. These referred to the paintings. This is the last amendment. I have not received possession of those yet.

MR. TOBIN: Why not?

MR. LEWIS: I am attorney for the estate of Annette W. Merritt, and those pictures are to remain in the house there until the death of the husband, and then the oldest child is to have first choice and then in the order of their ages; and her will also provides that those paintings cannot be removed in any instance.

WITNESS resuming:

I knew that the Amended Schedule A-2 under date of May 3rd. 1927, had been filed.

Q: Then, from the 3rd day of May, 1927, down to the middle of October, about the 13th day of October, 1927, or somewhere in that vicinity, you took no steps to ascertain any rights with respect to those two automobiles?

MR. TOBIN: From whom?

MR. HACKER: Against anybody.

MR. TOBIN: I object to that question. I think the schedule contains a sworn statement of the fact that those cars had been repossessed and were out of his

(Testimony of William H. Moore, Jr.)

hands. My objection is made on the ground it is immaterial.

THE SPECIAL MASTER: The objection is overruled. It might indicate that they were of no value, in his judgment.

(The Reporter read the question, by request, as follows: "Q: Then, from the 3rd day of May, 1927, down to the middle of October, about the 13th day of October, 1927, or somewhere in that vicinity, you took no steps to ascertain any rights with respect to those two automobiles?")

A: Yes, I asked Mr. Tobin to get them, and find out what equity there was in them, if any.

Q. BY MR. HACKER: When did you do that?

A. As soon as I heard about it.

Q. Early in May?

A. I think so.

Q. He did not come back to you with any information about it, or ask you to sign any petition, until in October, 1927, about the middle of October, 1927?

A I think so.

Q. You are familiar with automobile contracts, under which automobiles are sold in this section of the country?

A Yes sir.

Q. And you have the very contracts under which these automobiles were sold?

A Yes sir.

Q. You got those at the time you paid the Discount Corporation whatever was due on the cars, did you not?

A Yes, this last week.

Q. This last week?

(Testimony of William H. Moore, Jr.)

A. Yes sir.

Q. And you know that the title to cars sold under conditional sales contracts remains in the vendor, do you not?

MR. TOBIN: I object, unless it can be shown that the Discount Corporation has maintained the legal and the registered title, there being two forms of title.

THE SPECIAL MASTER: The objection is overruled.

A. Yes, I am familiar with the general form of those contracts, and the title would be reserved until the last dollar was paid.

Q. BY MR. HACKER: Exactly; and you knew that if you, as Trustee, would go to the people that repossessed those cars, that you might obtain the equity, did you not, that might possibly have vested in the bankrupt?

A. Not after repossession.

Q. Well, you did do that, did you not, in this very case, in October?

A. Well, that was because we understood, or I was advised by my attorney that the repossession was not in good faith, but was in conjunction with the bankrupt to conceal them.

I got the cars from Earl Lindley in Pasadena, and paid the money to the Discount Corporation who held the contracts. They gave me the receipted contracts and the Certificates of Registration and I already had the cars.

I did not see the answer of Mr. Merritt with respect to those pictures referred to in the Amended

(Testimony of William H. Moore, Jr.)

Schedule. The only information I had with respect to the terms of the will was from the schedule itself.

MR. HACKER: I want to read the fourth paragraph of the will of Annette W. Merritt. (Reading):

"Fourth: It is my desire that my four (4) pictures, painted by Tabor, and two (2) by DeLongpre and two (2) by Knowles, shall be divided equally among my four (4) children as they may agree, or in case they do not agree, they shall have their choice in the order of their ages, the oldest first, etc; they shall also divide among themselves my personal effects, furniture, jewelry, clothing, books and pictures and other items as they may agree, or if they cannot agree, they shall have their choice in each class as mentioned, in accordance to their ages, the oldest first, etc; provided, however, that all the foregoing items of personal property shall remain in the dwelling house during the lifetime of my husband, unless he shall otherwise direct,"

I received a conveyance of the automobiles and the pictures from Mr. Merritt, dated December 3rd, 1927.

MR. TOBIN: I desire to offer in evidence all of the files and records in this Court, in this matter, for information in the proceeding.

MR. HACKER: All the records in the file is too big an omnibus offer, and is not competent. This is a special proceeding, and the only thing that is competent is those that go to sustain the question.

MR. TOBIN: No, it is not a special proceeding.

THE SPECIAL MASTER: Yes, I think it is. The objection will be overruled.

MR. TOBIN: The Objecting Creditor rests.

"EVIDENCE OFFERED ON BEHALF OF BANKRUPT."

MR. HACKER: I desire to offer in evidence, in the transcript of the proceedings of May 24th, 1927, which is the Objecting Creditor's Exhibit No. "1" for Identification, and read from line 24, on page 2—(Interrupted).

MR. TOBIN: That will be objected to on the ground that it is irrelevant, incompetent, and immaterial, and is a self-serving declaration on the part of the Bankrupt, and is not the best evidence, the Bankrupt being present in Court at this time. It might be competent to be offered as an admission against interest on our part, but it is incompetent and immaterial for them to offer it as evidence on their own behalf.

THE SPECIAL MASTER: What is the testimony you propose to offer, and your purpose in offering it?

MR. HACKER: Here it is (exhibiting transcript to the Special Master), and the purpose is this: That before the Bankrupt was examined at all, and at the first meeting of creditors I asked leave to amend the schedules to include these two automobiles, and that matter was tacitly agreed to, and there was no objection to it at that time. I inadvertantly let it ride along before filing the amended petition and schedules, and the files now being in evidence, it shows that the matter was allowed to ride along before the same were filed, and the only purpose of this is to show that before anything had been done except to call a first meeting of the creditors the Bankrupt, through his attorney, discovering an error, or for any reason whatever, asked leave to amend the schedules to disclose the fact that he had these two automobiles.

THE SPECIAL MASTER: The objection is overruled.

MR. TOBIN: Is it the testimony of May 24, 1927?

MR. HACKER: Yes.

MR. TOBIN: I will object to it as being immaterial, irrelevant, and on the further ground that the offer of amendment was made two weeks afterwards.

THE SPECIAL MASTER: It might tend to show good faith after he learned the estate owned the automobiles.

MR. HACKER: I will read, beginning at line 24, page 2 of this transcript of May 24th, 1927, down to and including line 3 on page 3. (Reading):

"MR. HACKER: At the first meeting and examination of the Bankrupt here I asked leave to file amended schedules, and the matter was continued; and on the 18th of May I was in court here, and I arranged with Mr. Craig's office for a continuance for that purpose, and now I am going to ask to file the amended schedules."

MR TOBIN: I will ask to read the objection, and the ruling of the Court also, on that.

(The portion offered by Mr. Tobin, and to which he directed the attention of the Special Master, is as follows:)

"MR. TOBIN: We object to any ruling being made by the Court on that point until after the examination of this bankrupt. I don't think the amendment is made in good faith. It is the opinion of the Trustee and also the opinion of certain creditors that this man has undertaken to deliberately deceive certain creditors and conceal property and assets, and that nobody would take any interest in it. It is one of the most bad-faith

(Testimony of Lewis N. Merritt.)

bankruptcies I have ever dealt with, and we object to the filing of the amended schedules, and ask the Court to defer its ruling until after the examination of this bankrupt.

LEWIS N. MERRITT,

Called on his own behalf, testified:

The first time I came before the Referee in response to an Order for my examination was the 3rd day of May, 1927. I later filed, as of the 3rd day of May, the Amended Schedule A-2 showing the cars. It was at my examination before the Referee on the 7th of June that the question of the paintings involved in the fourth clause of my mother's will was brought to my attention. They were not scheduled in my original schedules. I knew nothing about them. I never had any knowledge that they belonged to me, or would ever belong to me, or which ones. I didn't know anything about it, because I never even read the will. I have since transferred to the Trustee whatever interest the Will gives me.

The Order to Show Cause issued by Referee Moss on the 7th day of October, 1927, was never served upon me. The first intimation I had of it was from my counsel, and I filed in the Referees' office on the 14th of October my reply to that Order, which is as follows:

Now comes the Bankrupt, Lewis N. Merritt, and in response to the Order to Shoe Cause herein why he should not be required to turn over to Wm. H. Moore, Jr., as Trustee in Bankruptcy herein, certain auto-

(Testimony of Lewis N. Merritt.)

mobiles, pictures and other property as set forth in the Petition of Wm. H. Moore, Trustee, sworn to October 5th, 1927, and shows to the Court as follows:

I.

That said automobiles were inadvertantly omitted from his petition, but that prior to any examination of him before said Referee, his attorneys moved for leave to amend his Petition by including said automobiles therein; and that on the day of June, 1927, an order was duly entered by said Referee allowing said amendment and schedule A-2 of respondent's Petition was amended to include said automobiles, reference to said Schedule A-2 now on file in this Court, is hereby made and respondent asks that the same be considered as if fully incorporated herein; that said automobiles were repossessed by the legal owner thereof and subsequently re-purchased by respondent; that respondent has failed to keep up his payments thereon and that they have again been re-possessed by the legal owner thereof.

Respondent hereby offers to transfer, assign and convey to the Trustee herein, in any way that he legally can, any right, if any he has, to said automobiles.

II.

That at the time of the filing of his original petition herein, there had been no selection of the pictures and other property referred to in the Fourth clause of the Will of Annette W. Merritt, deceased; and that his father, Lewis J. Merritt, was then and still is occupying the homestead and enjoying the benefit of all of said property named in said Fourth clause; that his interest in said property was of so little value, if of any value,

(Testimony of Lewis N. Merritt.)

that it was entirely overlooked; that the failure to schedule same was wholly inadvertant without any thought of concealing the same from the creditors or this Court; that he has prepared and is ready to file herewith, a Petition addressed to the Honorable Referee for leave to Amend his original Petition by including a description of the property covered by the Fourth clause of the will of Annette W. Merritt, deceased, and is ready and willing and hereby offers to surrender to said Trustee all of his right, title and interest in said last named property, and upon complying with whatever order the Honorable Referee may make herein, asks to have the Order to Show Cause hereinbefore referred to, discharged.

LEWIS N. MERRITT

Petitioner

Verified October 14th, 1927. Filed in the office of James L. Irwin, Referee, October 14th. 1927.

I was examined before the Referee subsequent to the filing of this reply and appeared as a witness.

MR. TOBIN: I make the same objection. There is a record of that whole proceeding.

MR. HACKER: There is no transcript of those proceedings, no transcript has been made up, and if Mr. Bowman has his note book showing that, I would be glad to have it.

MR. TOBIN: That turnover order recites it.

MR. HACKER: All right, what happened at that hearing is just as important.

THE SPECIAL MASTER: That document you have just read is sufficient indication of his willingness

(Testimony of Lewis N. Merritt.)

to turn over any right he has; it indicates his good faith. What this Court is particularly interested in is that transaction about his having the automobiles, about his getting them back; as to whether there was any understanding as to whether or not he would get them back.

MR. TOBIN: I realize that the question of the pictures is not important.

THE SPECIAL MASTER: No; and the fact that he has not schedules the automobiles in the schedules might be explained, if there was no agreement whereby he was to get them back from the Lindley Company after the schedules had been filed.

Q: BY MR. HACKER: Well, Mr. Merritt, was there any agreement or understanding between you and the Earl C. Lindley Motor Company that after these schedules were filed and you had been adjudicated a bankrupt, that you would get these cars back?

MR. TOBIN: That question is objected to on the ground that it is calling for a conclusion of the witness, and not a statement of facts.

THE SPECIAL MASTER: Yes, sustained, on the ground it is calling for a conclusion.

Q: BY THE SPECIAL MASTER: Why did you turn these automobiles back to the Company?

A. I could not keep the payments up.

Q. How long prior to your filing the petition in bankruptcy and your schedules here were they turned back?

A. I have tried to find those records, but nobody seems to be able to locate them.

Q. About how long prior?

(Testimony of Lewis N. Merritt.)

A. I had delivered the cars on four different occasions, at the request of Mr. McDonald, because I could not make the payments when they came due, and I would deliver them to Lindley and leave them there until I could make the payments, and I can't state unless I could find the records showing those payments, what the dates were. When I would get the money I would go and pay up on the cars and take them and use them, and that not only happened once, but it happened four times; but only twice, I think did they really serve papers on me.

Q. Were you contemplating filing a petition in bankruptcy when you delivered them the last time?

A. No sir.

Q. And you can't approximate the length of time prior to the filing of your petition here it was that you delivered the cars?

A. No sir.

Q. Whether it was the day before, a week before, a month before, or how long?

A No, I couldn't. I wish I could find some records, but I have none myself. I tried to look over Mr. McDonald's records to see when I made the back payments. That would be the only way I would know.

Q. How long were they in his possession before you got possession of them again?

A. I was back two or three months on each car.

Q. But how long did he keep possession of them this last time before you got possession of them again?

A. Which time do you mean?

(Testimony of Lewis N. Merritt.)

Q. Just prior to the filing of your petition in bankruptcy, when you were up here, you had just delivered them to him, and how long did they remain in his possession?

A. About two weeks.

Q. You were permitted to use some other machine during this time?

A. My father had two cars.

Q. Were you or not using a car of the Lindley Motor Company?

A. No. Mr. Lindley loaned me a Paige at one time; and he also let my son use the Nash at one time.

Q. That is hardly customary for automobile people to do that. How did he happen to do that with you; can you explain that?

A. Well, he did not do it with me, but I think he thought a good deal of the boy; in fact, he explained to me and said the boy felt bad about losing the car, and that he let him have it.

Q. For how long a time did he let him have it?

A. Just a day at a time. He returned it there every evening, I think.

Q. The boy returned the car there every evening?

A. I think so.

Q. And he sometimes let you use the Paige during that time?

A. On one occasion Mr. McDonald let me take the Paige, and I afterwards bought the Paige.

Q. He let you use the Paige, and did he let you use any other car during the times he had the two cars pending these bankruptcy proceedings?

(Testimony of Lewis N. Merritt.)

A. No sir.

Q. What conversation took place between you and Mr. Lindley when you delivered these cars to him just prior to the filing of the bankruptcy petition?

A. Mr. MCDonald had been calling me and kept calling me on the telephone and saying that I was in arrears, and he asked me—in fact, he suggested what was I going to do about it, and I went in and saw Mr. Lindley and told him about Mr. McDonald calling me, and I said, "I can't make the payments, and I will leave the cars here."

Q. You had no conversation with him about taking them back at some other time?

A. Absolutely none.

Q. How did you know he still had possession of them when you went after them the second time? Did you go to see him in the meantime?

A. Mr. McDonald came to collect on them just the same, whether I had the cars or not.

Q. You did not intend to turn them back permanently, but you only intended to turn them back until you could make the payments on them? That is, in order that you could keep up the payments?

A. I don't understand the question.

A. Mr. McDonald came to collect on them just the

Q. Did you just intend to turn them back until you could make the back payments up?

A. Well, I didn't know how that could be handled. I understood afterwards that it would be all right for me to make the payments. In fact, they demanded the payments of me.

(Testimony of Lewis N. Merritt.)

Q. You did not intend, then, to take them up again if you could make the payments?

A. No sir. I thought Mr. Moore would take possession of them.

Q. By the way, what was the reason you did not schedule the cars in the petition in the first place?

A. I was advised that I had no equity in them.

Q. Who advised you that?

A. Mr. Morris.

Q. Was he your attorney at that time?

A. Yes sir.

THE SPECIAL MASTER: Is Mr. Morris present here?

MR. HACKER: No.

Q. BY THE SPECIAL MASTER: If you intended to keep up your payments and get possession of them, did you not consider that you had some equity in them, then?

A. At the time there was so much owing on them that I didn't consider that I had any equity in them, and Mr. Morris and I discussed that. Of course, after I had made payments there was an equity in them.

Q. How much was the payments you made when you repossessed them after bankruptcy? How much did you pay in then?

A. From the time of my filing in bankruptcy until the time I had to give them up again, it was about $1,000.

Q. On the two cars?

A. Yes, sir.

THE SPECIAL MASTER: That is all.

(Testimony of Lewis N. Merritt.)

MR. HACKER: I have no further questions at the present time.

CROSS EXAMINATION:

I borrowed some money from the First Trust and Savings Bank to make these payments. I had an income of about $350.00 a month. I had a gross income of $500.00 a month and got $75.00 a month from the rent of a house but it cost more than that for taxes and maintenance. I did not schedule that $75.00 a month rent from the house. My income of $575.00 per month came from my mother's estate and I have been receiving it right along. It did not go into making up those back payments.

Question: I believe you testified on your direct examination that you re-purchased these cars from the Earl C. Lindley Motor Company; what was the re-purchase price?

Answer: Well, I said at the time that I did not know whether you would call it a re-purchase or not. I went and made a deal with Mr. McDonald on it.

Mr. McDonald told me that if I could make the payments, there would be no objection to my taking the cars. I do not know when that was. There was two months due then. I don't know that it was two months after I had gone into bankruptcy. I was not driving the car.

I remember Mr. Lewis examining me in Court relative to these automobiles on May 24th. Mr. Lewis asked me "Have you any automobiles" and the kind of car it was,—is that a Packard you are purchasing, and I answered, "Yes sir". and that I had paid about $3200.00

(Testimony of Lewis N. Merritt.)

for it. And he asked me if I was driving that car and I said that I am. I meant just what I said when I made that statement.

Question: Then you were driving that car on May 24th 1927, the date of the examination by Mr. Lewis in this Court, were you not?

Answer: I am not sure about that.

Question: Well, the next question and answer on page 7 is like this.

He asked me:

"Q. Have you got it with you today?

"A. No.

"Q: Where is it?

"A: In Pasadena.

"Q: What did you mean by that?

"A: I suppose I meant it was in Pasadena instead of being here."

Q: Is it not a fact that car was repossessed two days after that examination?

A. I delivered the car rather than have the notoriety and publicity. I told Mr. McDonald that I will take it down there because I cannot give you a check. When I said on June 7th, 1927, that the Earl Lindley Motor Company replevied these cars, I meant put them in the warehouse and put a yellow tag on them.

I went down there and surrendered those cars before I filed my petition in bankruptcy at the instance of Mr. McDonald, because he said if I didn't do so, he would come and get them.

On four different occasions I have had to give them up, I could not tell with respect to the time I filed my

(Testimony of Lewis N. Merritt.)
petition in bankruptcy unless I got some of the papers showing some of the back payments that I made.

At the time I verified these schedules I had a conversation with my attorney relative to the automobiles. I do not remember just what I said to him. He said that I had no equity in them and that they did not belong to me. I do not know that my defense is that I made a full and fair disclosure to my attorney. I don't remember what he said. He simply said that they didn't belong to me; that I had no right to schedule them. I told him that I wanted to turn in everything I had and that I had these on sales contracts. I did not tell him where they were. When we drew up the schedules I didn't know myself where they were. I told him the truth about them and I don't know now, at that date, what it was.

The schedules were amended subsequently on the advice of Mr. Hacker. At the time the original schedules were drawn I don't doubt that I had them in my possession. I did not, after drawing and swearing to my schedules, turn these automobiles back to Earl C. Lindley Motor Co. They asked for them and I delivered them to them because I could not make the payments. During the time they were in their possession I did not use them with the possible exception of the Packard, once.

Question: What did you mean by your answer on page 7 under date of May 24, 1927, when you were asked the question

'Question—Are you driving that car?

Answer—I am.'

Question: What did you mean by your answer to that question?

(Testimony of Lewis N. Merritt.)

Answer: What date was that?

Question: May 24, 1927, the second meeting here.

Answer: If I could get the record I could tell, and I don't see why the Commercial Discount Company don't have it, because it would show exactly.

Question: Here is the transcript of your answer as to that, on May 24, 1927, and you knew at that time, the time you gave that testimony, whether or not you had possession of that car.

Answer: I presume I did.

Question: What did you mean by saying that you were driving that car at that time, May 24, 1927?

Answer: I don't know. I don't know, - - - don't remember what I testified.

Question: As a matter of fact that car was in your garage in Pasadena on that date, was it not?

Answer: I don't know. I can't tell.

Question: What did you mean when you said it was in Pasadena ?

Answer: I meant it was in Pasadena.

Question: Whereabouts in Pasadena?

Answer: I don't know.

Question: What did you mean by answering this question this way:

'Question: What other automobiles have you?

Answer: I have a Nash roadster my son uses.

Question: A Nash roadster that your son uses?

Answer: Yes.

Question: Where did you get that?

Answer: I bought that from Earl C. Lindley.'

Question: Do you remember that testimony?

(Testimony of Lewis N. Merritt.)

Answer: Yes sir.

THE SPECIAL MASTER: Might it be stipulated how much was due on these automobiles, or how much was paid by Mr. Moore to the Finance Company?

MR. LEWIS: Yes, I know that Mr. Moore paid $1100, and the two cars brought $2,050.00.

THE SPECIAL MASTER: The Trustee had an equity of how much?

MR. TOBIN: About $900.

THE SPECIAL MASTER: And Mr. Merritt paid how much during the interim after bankruptcy?

THE WITNESS: About $1,000.

THE SPECIAL MASTER: Is there any question about that?

MR. TOBIN: Those figures are correct, but those cars were held there and they depreciated, and at the time of the bankruptcy they would have brought a higher price.

MR. HACKER: The wholesale value of them—(Interrupted).

MR. TOBIN: That is immaterial. The fact remains that he had the registered title and was driving them, and if his equity had only been $25 it was his duty to turn them in to the Trustee and let the Trustee get whatever he could for them.

THE SPECIAL MASTER: To be perfectly frank with you, if a motion had been made for dismissal, on the ground that you had not proven your case, it would probably have been granted. The fact that a man fails to schedule two automobiles, the title to which it might take quite a skilled lawyer to decide, or whether he really

(Testimony of Lewis N. Merritt.)

had any equity in the cars, is probably not sufficient ground to deny the discharge. The chances are that if he had scheduled them the Trustee would have taken possession and there would have been a petition in reclamation filed here for them. A great many lawyers might have advised the bankrupt not to schedule them. This is not such a concealment of assets as would be sufficient grounds for the denial of a discharge, as I see it at this time. Of course, the pictures, there is no question about those. A most vigorous examination was made by the attorney for the Estate who probated the will; he made a vigorous cross-examination of the gentleman (indicating the Bankrupt), and he knew the facts about those pictures, and there has been no reason shown for concealing the facts concerning the pictures. The only question is as to the automobiles.

MR. TOBIN: The fact remains that he had an original investment of $1200 in the automobiles.

THE SPECIAL MASTER: If you could prove that there was any agreement between the Bankrupt and the Lindley Motor Car Company that they were to hold them, it would be different. A bankrupt does not schedule property that is not in his name.

MR. TOBIN: He had an equity and a property right in them.

THE SPECIAL MASTER: That is the question to be determined.

MR. TOBIN: I would like to go ahead and make my record complete. They have failed to make their motion on time.

THE SPECIAL MASTER: Proceed.

(Testimony of Lewis N. Merritt.)

Question: (By Mr. Tobin) Now, at the time you gave that testimony, you knew where that car was?

Answer: Yes.

Question: Where was it?

Answer: I knew where it was, but unless I could know the date I couldn't tell you.

Question: I mean as of May 24, 1927.

Answer: What did I say there?

Question: You said it was in Pasadena.

(No further response by the witness.)

Question: Your son was using the Nash all the time?

Answer: No, sir.

Question: Then what did you mean by this question and answer:

'Question—What other automobiles have you?

Answer—I have a Nash roadster—my son uses.'

Question: What did you mean by that?

Answer: I meant I had bought it for the use of my son.

Question: And your son was using it at that time?

Answer: I don't know that. I couldn't tell you unless—there must be some record that somebody can get that will show the exact dates those cars were in my possession and the exact dates they were not in my possession. (ADJournment on motion of Master.)

My occupation is a traveling salesman. I was not working as a traveling salesman at the time I filed my petition in bankruptcy.

I am acting as guardian of the person of my father, and live there with him most of the time. At the time I went into bankruptcy I was not paying any house rent.

(Testimony of Lewis N. Merritt.)

Yes, I had a gross income of $575.00 per month. I was unable to pay the two $80.00 payments on the automobiles out of an income of $575.00 per month.

I cannot tell you what ones of the payments were made on the Nash prior to the filing of my petition in bankruptcy. I had made the January payment and subsequent payments, including February, but I am not sure about the March payment. I had paid about $1000 on the car at the time of the filing of the petition. I also paid the November, December, January and February payments on the Packard car and I had more than $1000.00 invested in that car, or a total of $2000.00 in both cars at the time I made the schedules. I don't exactly remember this morning what I told my attorney at the time I consulted him regarding the leaving of these contracts out of my schedules. I made these payments on the cars by check but I have not the cancelled checks because I don't think I kept them.

I cannot tell when was the first time that I returned these automobiles to Earl C. Lindley. I know that there were four different times. The first time was before the first of April, 1927, and the cars were left there for several weeks. I cannot recall the date of the second time. Mr. McDonald asked me to leave the cars there until the payments were made up. Question—Then at the time you turned these cars back to Mr. Lindley's garage, they were turned back with the understanding with the fiance company that was holding the contracts that they would be left there until the payments were paid up?

Answer—That is the way they talked to me.

(Testimony of Lewis N. Merritt.)

Question: Give up possession until you paid up?

A—I don't know that that was said. He called me and told me I would have to give up possession of the cars as I was back in my payments. The last time Mr. McDonald simply came and got them, in the month of October. At one time he talked to me when I met him at the Lindley Motor Co. in the morning. I went there to meet him. I told him I simply could not keep up my payments and he said, well, leave them here. Nothing was said as to how long they were to be left. At one time, I don't remember the particular time—I went to the bank and borrowed the money and made the payments.

I have not been in bankruptcy before but a corporation which I ran and in which I was a stockholder went into bankruptcy some years ago. I always understood that Mr. Bueneman and I owned it half and half. The claim filed here by S. H. Peters represents stockholders liability in that failure. I was a witness in the bankruptcy proceedings when the company failed. I was an officer of the corporation. I don't remember whether I was examined at great length in the proceedings of Lewis N. Merritt Company, bankrupt, in connection with my official position as an officer of that corporation, but I presume I was. That has been a good many years ago. I dont' remember whether I signed the schedules in that proceeding.

Question: You knew, however, that it was the duty of the bankrupt, did you not, to schedule all of his assets?

Answer: Yes, I had that common knowledge. I know it is the duty of the Bankrupt to schedule all of his assets.

(Testimony of Lewis N. Merritt.)

Q: And you knew at the time you verified these schedules that you had an investment of $2,000 in these two automobiles, did you not?

A: I considered that with Mr. Morris, and it was talked over as to the equity in it, or in them.

Q. Did you not testify here yesterday that you did not remember what conversation you had with Mr. Morris, and that you could not tell this Court what you told Mr. Morris and what Mr. Morris told you.

A: I said I could not tell what *i*—what we talked about, my recollection is that he advised me that he had—that that was the way to handle it.

Q: As a matter of fact, you were worried enough about the cars that you consulted your attorney about it?

A: Well, Mr. Morris and I went through everything.

Q: It was not a case on your part of forgetting the cars; that was not the reason why they were not listed; you knew you had them?

A: I couldn't tell, because, in the contracts it said I had no rights, and that they were not my property, and I was at a loss about it, and I simply left it up to my attorney.

Q: But you don't remember what you told your attorney?

A: I don't remember the exact conversation, no.

MR. TOBIN: I believe that is all.

MR. HACKER: That is all.

BANKRUPT'S EXHIBIT NO. 1: Conveyance by Lewis N. Merritt to Wm. H. Moore, Jr., as Trustee: "All of his right, title and interest in and to that certain Packard automobile and that certain Nash roadster

(Testimony of Frank McDonald.)

now in the possession of the Earl Lindley Motor Company, being the same automobiles that said bankrupt was purchasing from said Earl Lindley Motor Company on conditional sale contracts for each car respectively, and all his right, title and interest in and to the following described property:

Four pictures painted by Tabor,

Two pictures painted by DeLongpre, and

Two pictures painted by Knowles,

the interest in said last named property being that given to him by the terms of the Will of his mother, Annette W. Merritt, deceased;"

Dated December 3rd, 1927; filed in the office of the Referee, December 30th, 1927.

FRANK McDONALD,

recalled:

I am familiar with the two cars involved in this hearing, and it is my business to appraise and make collections on all kinds of automobiles, all makes. The value of the Packard car on April 1st, 1927, was around $1100.00. The balance due on that car April 1st, 1927, was $1016.76. The Nash car was worth about $950.00 to $1000.00, and there was due on it as of April 1st, 1927, $976.56.

CROSS EXAMINATION:

Q. How did your people happen to let Mr. Merritt have those cars back, if there was more against them than they were worth?

A. It is always my object and the company has always tried to work out some plan, it don't matter who

(Testimony of Frank McDonald.)

or how much money there is involved, to try to get it paid.

The first time I took the automobile back was March 18th, 1927, and we had the car in the Earl Lindley Motor place about two weeks, when we released it. The March payment was made, which brought it down to April 5th, 1927.

The second time we took it back was on April 18th. The April payment was then behind. The car was worth at that time, $975.00 or $1000.00.

And the other time we took it back was on the 26th of May. When we took it back in April we retained it approximately three or four weeks. I told Mr. Merritt that we were going to hold it for a reasonable length of time. I didn't tell him that we were going to hold it until he caught up with the payments. We don't tell anybody that. We may see fit to sell a car at wholesale anytime if we repossess it.

THE SPECIAL MASTER: I do not see anything to cause me to change my views as expressed yesterday.

The only question is whether there is bad faith in not scheduling these automobiles and certain paintings, and as I stated, a reasonably prudent man, or even attorneys, might differ whether property held on contract, that has already been returned, need be schedules. This bankrupt did not have the title to these automobiles, as I understand it; they were not registered in his name.

MR. TOBIN: Yes, both were registered in his name.

THE SPECIAL MASTER: But at most all he had was a contract for the purchase of them, and they were returned prior to the filing of the schedules in bankruptcy. He might have decided that he did not own

them, and that he could not hold them; or that going into bankruptcy he should not keep up the payments, and that he would turn them back to the people who did own them, and I can*n* see where a reasonably skilled attorney might advise him that they were not his property, and he returned them to the owner. He had no claim on the title. He might have had a very inconsequential equity in their value, but as it turned out, he had no equitable value, and apparently the Trustee did not think there was any equity; and Mr. Moore is a very careful man, and he usually takes hold of everything that he thinks has any value; but he let it go on for months here until the Bankrupt made more payments, making the cars more valuable to the estate, and then he took possession of them and sold them for only the amount that the Bankrupt has paid on them since they were repossessed. So, I can see no bad faith in not scheduling these automobiles. It probably would have been better practice to schedule them. But they were not in his possession; he turned them back to the party who owned them. The whole thing hinges on whether there was any agreement between Mr. McDonald and the Finance Company, or the Lindley Motor Company, to return them; but the Objecting Creditor has made no attempt to show that. The only thing in that connection was a question that was asked by the Court here, as to whether or not that was done, and he said "No."

MR. TOBIN: He was not a party to the contract.

THE SPECIAL MASTER: He testified there was nothing of that kind, and at any rate, there is nothing

to show that there was any agreement that the Bankrupt could leave them there during the pendency of the bankruptcy, and then go back and get them. If there was any agreement to that effect, I would hold differently.

Now, regarding the equity in the pictures. That was so slight, and the bankrupt testified that he did not know he had any equity in them, and they might be considered as household furniture or furnishings, which would be exempt; and that he had no right to them until his father died, and that he then had only a right to take a choice. He has no possession of them now, and probably never will have.

There might have been bad faith in the case, but it certainly is not in regard to the automobiles or the pictures.

Objecting Creditor's Exhibit No. 1: Conditional Sales Contract dated October 5th, 1926, between Earl Lindley Motor Company of the first part, and Lewis N. Merritt of the second part, covering the sale of the Nash roadster in question. Sale price, $2088.84; cash payment, $624.00; balance to be paid in installments of $81.38, beginning November 5th, 1926, and ending April 5th, 1928.

Said contract also provided as follows:

IT IS HEREBY STIPULATED AND AGREED by and between the Seller and the Purchaser that the following are the conditions under which the above described personal property is sold and purchased:

1. The Purchaser hereby acknowledges receipt of said personal property and agrees that he has examined the same and that it is in good order and repair, and said

Purchaser further agrees that he will, at his own expense, during the life of this contract, repair any injuries sustained by said personal property, and keep the same in good order and repair as when received, and that he will pay all taxes and assessments levied or assessed against said personal property, and that he will not permit the same to be removed from his possession, to be attached or replevined, nor create nor permit to be created any lien or encumbrance against the same, on account of claims against him, or for storage, repairs, or otherwise; and said Purchaser also further agrees that the Seller may take possession of said personal property for the purpose of putting the same in repair in case the Purchaser fails to keep the said personal property in good repair, but the taking possession thereof for such purpose shall not operate as an election by the Seller to terminate this contract, and all bills for repairs done upon, and labor and material furnished, by the Seller to or for said personal property before the final payment thereon is made shall be added to the purchase price of said personal property, and be payable to the Seller on or before the 10th day of the next succeeding month and shall bear interest and be subject to all the terms of this contract, as though an original part of the purchase price of said personal property. The Purchaser further agrees that said personal property shall never be used by any one, including the Purchaser, when such use is in violation of any law or ordinance of the United States, State of California, ordinances of any County of the State of California, or of any municipality within said State, or used for any purpose whereby it is liable

to seizure by reason of the violation of any of the aforesaid laws or ordinances, and it is further agreed that said personal property shall never be taken from the possession of such Purchaser by reason of any alleged violation by the Purchaser or any other reason, of any of said laws or ordinances.

2. The Purchaser agrees to pay all taxes and assessments levied or assessed against said personal property, but in the event that said Purchaser shall fail to pay said taxes and assessments the Seller may, at his option, pay the same, and all sums so paid by the Seller shall be added to the purchase price of said personal property and be payable to the Seller on or before the 10th day of the next succeeding month, and shall bear interest and be subject to all the terms of this contract, as though an original part of the purchase price of said personal property.

3. The Purchaser agrees not to sell, attempt to sell, lease, mortgage, hypothecate, or otherwise dispose of said personal property, or take the same out of the State of California, during the life of this contract, or any of his rights hereunder, and any assignment of this contract, or any of the Purchaser's rights hereunder, by the Purchaser, or by execution or other legal process, or otherwise, or the transfer thereof by process of law, or otherwise, shall, at the option of the Seller, terminate all rights hereunder to purchase said personal property. The Purchaser agrees not to use or permit said personal property to be used for hire, or in a race or speed test, during the life of this contract, without the written consent of the Seller. The Purchaser agrees not to use or permit said personal property to be used for, or in connection with, any act prohibited by law.

4. The Seller may, but shall not be obliged so to do, keep said property insured in a company selected by the Seller, and in favor of the Seller, for fire, theft, confiscation, wrongful conversion, and such other forms of insurance as may be required by the Seller, in such an amount as the Seller shall desire; said insurance shall be at the expense of the Purchaser, payment for the first premium thereon to be made by the Purchaser at the time of the execution of this contract, and payment of subsequent premiums to be made by the Purchaser on demand of the Seller or the Insurance Company furnishing such insurance. In the case of any damage to or loss of said personal property, either partial or total, all insurance money collected shall be retained by and belong to the Seller, and any such loss, whether insured or not, shall not relieve the Purchaser from carrying out the terms of this contract; and making the payments as provided for herein; provided, however, that the Seller shall credit any insurance collected upon the unpaid balance due or to become due under this contract, and in the event there is any surplus, such surplus shall belong to the Purchaser; and provided, further, that, should the Seller so elect, he may apply any insurance collected to the repair and restoration of said personal property instead of crediting the same upon the indebtedness of the Purchaser.

5. The Purchaser agrees to save the Seller harmless from any and all liabilities or alleged liabilities, including all costs and attorneys' fees, for all injury or damages to persons or properties caused in any manner by the use of said personal property.

6. In the event the Purchaser fails or neglects to comply with any of the terms, covenants or conditions of this contract, or to make *of* any of the several payments provided for herein, when due, or in the event that the Purchaser shall become financially involved, or insolvent, or shall be adjudicated a bankrupt, or shall fail to pay the premium on said insurance on demand, or in case, of any unusual or unreasonable depreciation in the value of said personal property, the Seller, at his option, and without notice to the Purchaser, may elect to declare the whole purchase price immediately due and payable, or the Seller may without notice to the Purchaser, declare all of the rights of the Purchaser under this contract terminated, and without demand first made, and with or without legal process. immediately take possession of said personal property *whever* found, using all necessary force so to do, and hold the same discharged from further liability under this contract, and the Purchaser waives all claims for damages due to, or arising from or connected with any such taking. In the event the Seller elects to take possession of such personal property, all of the rights of the Purchaser under this contract shall immediately terminate, and all payments theretofore made hereunder shall belong absolutely to the Seller; provided. however, that such termination shall not release the Purchaser from any payments due and unpaid at the time of such termination, and the Purchaser hereby agrees to pay to the Seller any and all sums which may be so due and unpaid to said Seller at the time thereof.

7. Until the Purchaser has fully complied with all the terms, covenants and conditions of this contract, and

made all of the payments as herein provided, said personal property, including all parts, accessories and equipment now or hereafter attached to or used in connection with said personal property shall belong to, and the title to said personal property shall remain in the Seller. Possession of said personal property shall give the Purchaser no title or interest therein and no rights except as herein provided. If the Purchaser shall fully comply with all of the terms, covenants and conditions of this contract, and make all of the payments as herein provided, the Seller agrees to give a bill of sale of said personal property to the Purchaser and convey title to him.

8. It is agreed that the Seller may assign and transfer his rights under this contract, and any such assignment, whether merely for the purpose of security or otherwise, shall vest in the assignee of the Seller all of the rights hereby reserved and granted to the Seller, together with title to said personal property. In the event of any such assigment, all money payable under this contract by the Purchaser shall be paid to such assignee of the Seller, in full, without recoupement, set-off, or counter-claim of any sort whatsoever, and the Purchaser shall be estopped to deny as to such assignee any of the statements contained in this contract, or to allege that there were any representations made by the Seller which are not contained in this contract.

9. In the event that the Seller, because of the failure of the Purchaser to perform any of the promises and covenants herein provided for, shall elect, under the terms of this contract to retake possession of said personal property or to collect any installment or installments of the purchase price or to enforce any other

remedy hereunder, the Purchaser agrees to pay to the Seller any expenses incurred by the Seller in recovering the possession of said personal property, or in collecting any installment or installments of the purchase price, or in enforcing any other remedy hereunder, including a reasonable attorney's fees, which shall in no case be less than the sum of One Hundred ($100.00) Dollars.

10. Should the Purchaser fail to pay any installment above specified, when due, it is hereby agreed that the Seller may refer the matter of the collection of such delinquent installment to any person or collection agency or to the collection department of the Seller, or his assignee for collection, and if the same be so referred, the purchaser agrees to pay to the Seller a reasonable collection charge, which shall in no event be less than two per cent of said delinquent installment.

11. The Purchaser agrees forthwith to properly register said personal property and procure a license therefor from the Motor Vehicle Department of the State of California, and to immediately report the number thereof in writing to the Seller, who shall have the right to insert the State license number in the blank above provided therefor.

12. Time and each of its terms, covenants and conditions are hereby declared to be of the essence of this contract, and acceptance by the Seller of any payment hereunder, after the same is due, shall not constitute a waiver by him of this or any other provision of this contract.

13. It is agreed that this instrument contains the entire agreement between the contracting parties and that no statement, promise or inducement made by any party

hereto, or employee, agent or salesman of either party hereto, which is not contained in this written contract, shall be binding or valid; and this contract may not be enlarged, modified or altered except by endorsement hereon, and signed by the parties hereto.

14. It is agreed that the Purchaser will exhibit said personal property and allow inspection thereof at any time upon demand of the Seller and that the Purchaser will notify the Seller of any change of his address.

15. This contract is executed in quadruplicate, of which concurrently with the execution thereof three (3) copies are delivered to the Seller and one (1) copy is delivered to the Purchaser and the receipt of a copy of this contract is hereby acknowledged by the Purchaser. This contract shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto.

Objecting Creditor's Exhibit No. 2, Conditional Sales Contract, dated October 5th, 1926, covering a used Packard sedan, the car in question, sale price, $2176.14; cash payment, $651.00; balance payable in installments of $84.73, beginning November 5th, 1926, and ending April 5th, 1928.

This contract is identical in terms and conditions except as above stated with Objecting Creditor's Exhibit No. 1. Both of these contracts seem to have been assigned to the Commercial Discount Company.

Settled and allowed this 2nd day of May 1928.

Wm P James
District Judge

[Endorsed]: Statement of Testimony Take on Hearing of Objections to Discharge. Lodged Apr. 3, 1928, at 20 min. past 1 o'clock P. M. R. S. Zimmerman clerk, by B. B. Hansen, deputy. Settled Statement. Filed May 2, 1928 at 10 a. m. R. S. Zimmerman, clerk, by Edmund L. Smith, deputy clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

In Bankruptcy 9569-J

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In the Matter of)
LEWIS N. MERRITT,) ORDER
Bankrupt)

- - - - - - - -

The Court having examined the statement of facts prepared by the petitioning bankrupt, and the amendments thereto proposed by the Objecting Creditor, and the Court having considered the same, orders:

IT IS HEREBY ORDERED that the said statement of facts as amended be, and the same is hereby approved.

Wm. P. James
District Judge.

[Endorsed]: Original. In the District Court of the United States, Southern District of California, Southern Division. In Bankruptcy 9569-J. In the Matter of Lewis N. Merritt, Bankrupt. Order. Filed Apr. 18, 1928, at 30 min past 12 o'clock P. M. R. S. Zimmerman Clerk, B. B. Hansen, deputy. Nicholas W. Hacker 419 Pacific S. W. Bldg., Pasadena, Calif

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

In the Matter of) No. 9569-J In Bktcy.
LEWIS N. MERRITT,) MEMORANDUM OF
Bankrupt.) CONCLUSIONS,
) AND ORDER

Objections to the discharge of the bankrupt having heretofore been filed, and the issue so made having been referred to Referee Irwin as Special Master to take the testimony and report the facts and his conclusions thereon; and the said Referee having, after due hearing, reported against the objections of the creditor and having recommended that the discharge be granted; and the objecting creditor having taken exceptions to said report, and said exceptions having been duly presented and argued and submitted for decision, and the court being advised in the matter:

The Court now concludes that upon the evidence presented to the Special Master it was made to appear that the bankrupt had wilfully withheld from his schedules the true facts respecting his equity in the two certain automobiles referred to by the objecting creditor, and that said bankrupt did, while being examined under oath before the Referee in Bankruptcy in the due course of the said bankruptcy proceedings, withhold and conceal the true facts concerning the equity possessed by him and the facts concerning his possession and his right to possession of said automobiles; and the Court therefore finds that the findings and conclusions of the Special Master are not sustained by the evidence;

It is ordered that the exceptions to the report of the Special Master in the particulars hereinabove set forth are sustained; and it is ordered that the discharge of said bankrupt be and it is denied.

Dated this 12th day of March, 1928.

Wm. P. James
District Judge

[Endorsed]: No. 9569-J. In Bktcy. U. S. District Court, Southern District of California. In the matter of Lewis N. Merritt, Bankrupt. Memorandum of Conclusions, and Order. Filed 5 o'clock P. M. Mar. 12, 1928. R. S. Zimmerman Clerk, By Murray E. Wire, deputy clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION
IN BANKRUPTCY NO. 9569-J

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In the Matter of)
LEWIS N. MERRITT,) NOTICE OF
Bankrupt) APPEAL

- - - - - - - -

To William T. Craig, Esq., Attorney for S. H. Peters, Objecting Creditor:

PLEASE TAKE NOTICE that the above named Bankrupt, conceiving himself aggrieved by the final order and decree entered on the 12th day of March, 1928, in the above entitled proceeding, dismissing the petition and application for discharge and denying the said Bankrupt a discharge in bankruptcy from his debts.

does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, Southern Division.

Lewis N. Merritt
Bankrupt.

Nicholas W. Hacker
Attorney for Bankrupt.

[Endorsed]: Original 9569-J. In the District Court of the United States Southern District of California Southern Division. In Bankruptcy No. 9569-J. In the matter of Lewis N. Merritt Bankrupt. Notice of Appeal. Service of the within Notice of Appeal is hereby admitted this 21 day of March, 1928. S. H. Peters. Filed Mar. 21 1928 at 30 min. past 1 o'clock P. M. R. S. Zimmerman Clerk, B. B. Hansen deputy. Nicholas W. Hacker Counselor at Law Pacific Southwest Bldg. Pasadena, Calif.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION
IN BANKRUPTCY 9569-J.

In the Matter of)
LEWIS N. MERRITT,) ASSIGNMENT OF
Bankrupt) ERRORS

Now comes Lewis N. Merritt, Bankrupt and complainant, and files the following assignment of errors on appeal from order of this Court dated March 12th, 1928.

First: That the United States District Court for the Southern District of California, Southern Division, erred in finding that the Bankrupt had wilfully withheld from his schedules the true facts respecting his equity in two

certain automobiles referred to by the objecting creditor.

Second: That the Court erred in finding that said Bankrupt did, while being examined under oath before the Referee in Bankruptcy, in the due course of said bankruptcy proceeding, withhold and conceal the true facts concerning the equity possessed by him in said automobiles.

Third: That the Court erred in finding that said Bankrupt while being examined under oath before the Referee in Bankruptcy, withheld and concealed the facts concerning his possession and his right to possession of said automobiles.

Fourth: That the Court erred in finding that the Findings and Conclusions of the Special Master, to whom said petition for discharge was referred in due course, were not sustained by the evidence.

Fifth: That the Court erred in sustaining the objections to the report of the Special Master.

Sixth: That the Court erred in denying a discharge herein to the said Bankrupt.

Seventh: That the Court erred in failing to find that the Bankrupt should be granted a discharge from his debts unless and except he has committed an offense or performed one of the acts specified and set forth in Section 14 of the United States Bankruptcy Act, and the amendments thereto.

WHEREFORE, he prays that said order may be reversed and his discharge granted.

Lewis N. Merritt
By Nicholas W. Hacker
Nicholas W. Hacker
Solicitor for Bankrupt.

[Endorsed]: 9569-J. Original. In the District Court of the United States Southern District of California, Southern Division. In Bankruptcy No. 9569-J. In the matter of Lewis N. Merritt Bankrupt. Assignment of Errors. Copy received this 23d day of March, 1928, W. T. Craig, Atty for W. H. Moore, Trustee Estate Lewis N. Merritt, Bkt. Filed Mar. 23, 1928, at 10 min. past 2 o'clock P. M. R. S. Zimmerman, Clerk. B. B. Hansen, deputy. Nicholas W. Hacker, counselor at law, Pacific Southwest Bldg. Pasadena Calif

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IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

In the Matter of	)	In Bankruptcy
LEWIS N. MERRITT,	)	No. 9569-J.
Bankrupt	)	ORDER FOR COST
	)	BOND.

It appearing that the Bankrupt has filed Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order entered in the above entitled case on the 12th day of March, 1928,

IT IS ORDERED that the amount of cost bond of said appeal herein be and hereby is fixed in the sum of Two Hundred Fifty Dollars ($250.00), conditioned as required by law and rule of this court.

Wm P James
United States District Judge

Dated March 28, 1928.

[Endorsed]: Original. In the District Court of the United States, for the Southern District of Cali-

fornia, Southern Division. In the Matter of Lewis N. Merritt, Bankrupt. No. 9569-J. Order for Cost Bond. Filed Mar. 28, 1928, at 30 min. past 12 o'clock p. m. R. S. Zimmerman, clerk B. B. Hansen, deputy. Nicholas W. Hacker Counselor at law, Pacific Southwest Bld. Pasadena Calif.

(Cut)
Company's Home
Office Building
100 Broadway, New York

American Surety Company
of New York
Capital $5,000000.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

IN THE MATTER OF) IN BANKRUPTCY
LEWIS N. MERRITT,)
BANKRUPT.) NO. 9569-J

KNOW ALL MEN BY THESE PRESENTS that the undersigned, AMERICAN SURETY COMPANY OF NEW YORK, a Corporation duly organized and existing under the laws of the State of New York, duly authorized to transact business within the State of California, as Surety, is held and firmly bound unto S. H. PETERS, Objecting Creditor of the Estate of Lewis N. Merritt, Bankrupt, in the penal sum of TWO HUNDRED FIFTY ($250.00) DOLLARS, well and truly to be paid to the said S. H. PETERS, Objecting Creditor herein, for the payment of which we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed and dated at Los Angeles, California, this 28th day of March, 1928.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT

WHEREAS, Lewis N. Merritt, Bankrupt petitioner, has appealed to the United States Circuit Court of Appeals of the Ninth Circuit from the order of the said District Court of the United States for the Southern District of California, Southern Division, denying the petition of the said Lewis N. Merritt, Bankrupt, for his discharge, which said final order was made and entered of record March 12, 1928, in the records and files of said Court.

NOW, THEREFORE, if the said Lewis N. Merritt, Bankrupt, shall prosecute his said appeal to effect and answer all costs and damages that may be awarded against him in said appeal, if he fails to make his said appeal good, then this obligation shall be void, otherwise to be and remain in full force and effect.

IN WITNESS WHEREOF, the seal and signature of the said surety company is hereto affixed and attested by its duly authorized officers in the City of Los Angeles, State of California, District aforesaid, this 28th day of March, 1928.

AMERICAN SURETY COMPANY
OF NEW YORK

[Seal] By A. M. Wold
Resident Vice-President

Attest: I. Taylor
Resident Assistant Secretary

Approved March 28 1928
Wm P James Judge

Premium charged for this bond is $10.00 per annum.

State of California,)
)ss.:
County of Los Angeles)

On this 28th day of March, A. D. 1928, before me, Frank McWhorter a Notary Public in and for Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared A. M. Wold personally known to me to be the Resident Vice-President and I. Taylor personally known to me to be the Resident Assistant Secretary of the AMERICAN SURETY COMPANY OR NEW YORK, the Corporation described in and that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in the Certificate first above written.

[Seal] Frank McWhorter

Notary Public in and for the County of Los Angeles. State of California.

My commission expires Feb. 3, 1932.

[Endorsed]: 9569-J. Bkcy. Principal and American Surety Company of New York. Surety. To S. H. Peters, Objecting Creditor, Obligee. Bond for $250.00 Filed Mar. 28, 1928 at ....min past 5 o'clock P. M. R. S. Zimmerman, clerk. B. B. Hansen, deputy. Dated 3/28/28

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION
In BANKRUPTCY 9569-J.

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In the Matter of)
LEWIS N. MERRITT,) PRAECIPE
Bankrupt)

To the Clerk of the United States District Court for the Southern District of California, Southern Division:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled proceeding, and to include in such transcript the following:

1. Order of adjudication and reference.
2. Petition of Lewis N. Merritt for his discharge.
3. Order of Compliance.
4. Objections of creditor to discharge.
5. Report of Special Master recommending discharge.
6. Exceptions of Objecting Creditor to Special Master's report.
7. Testimony taken before the Master as settled by the Court.
8. Order overruling Master's report and denying discharge.

9. Notice of Appeal.
10. Assignment of Errors.
11. Order fixing cost bond.
12. Cost bond.
13. Praecipe.

Nicholas W. Hacker
Solicitor for Appellant Bankrupt

[Endorsed]: Original. In the District Court of the United States Southern District of California, Southern Division. In Bankruptcy 9569-J. In the Matter of Lewis N. Merritt, Bankrupt. Praecipe. Service of the foregoing Praecipe admitted this 3 day of April, 1928. W. T. Craig Solicitor for Appellee and Objecting Creditor Filed Apr. 3 1928 at 20 min past 1 o'clock P. M. R. S. Zimmerman, clerk B. B. Hansen, deputy. Nicholas W. Hacker Counselor at Law. Pacific Southwest Bldg. Pasadena, California.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

In BANKRUPTCY 9569-J.

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In the Matter of)
LEWIS N. MERRITT,) CLERK'S CERTIFICATE.
Bankrupt)

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 81 pages, numbered from 1 to 81, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the order of adjudication and reference, petition of Lewis N. Merritt for discharge, order of compliance, objections of creditor to discharge, report of special master recommending discharge, exceptions of objecting creditor to special master's report, testimony as settled by the court, order overruling master's report and denying discharge, notice of appeal, assignment of errors, order fixing cost bond, cost bond and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to 12.50 and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 14th day of May, in the year of Our Lord One Thousand Nine Hundred and Twenty-eight, and of our Independence the One Hundred and Fifty-second.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Edmund L. Smith
Deputy.

No. 5493.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Lewis N. Merritt,
Appellant,

vs.

S. H. Peters,
Appellee.

APPELLANT'S BRIEF.

NICHOLAS W. HACKER,
Attorney and Solicitor for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No. 5493.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Lewis N. Merritt,
Appellant,

vs.

S. H. Peters,
Appellee.

APPELLANT'S BRIEF.

STATEMENT OF FACTS.

This is an appeal from the final order and decree of the District Court for the Southern District of California, Southern Division, entered on the 12th day of March, 1928, in the matter of Lewis N. Merritt, bankrupt, dismissing the petition and application of the bankrupt for discharge, and denying said bankrupt a discharge in bankruptcy from his debts [Record, p. 73].

Lewis N. Merritt was on the first day of April, 1927, in the District Court aforesaid duly adjudicated a bankrupt [Record, p. 2]. The controversy herein arises from the failure of the bankrupt to schedule his interest, if any, in two automobiles, as well as certain pictures to which he had a right of selection after the death of his

father under the terms of the will of his mother, Annette W. Merritt, deceased. Under the terms of this will, the four children of Annette W. Merritt were entitled to select in the order of their ages two of said paintings, said bankrupt having third choice thereof; but that said choice could not be made, nor any possession of said paintings taken until after the death of the father of the bankrupt, Lewis J. Merritt, who is still living. [Record, pp. 32-33.]

The interest of the bankrupt in these pictures was of such slight value and the time that he might be entitled to come into possession of two of them by selection so uncertain that objections to discharge in regard to said pictures was practically abandoned and wholly ignored in the order of the court. [Record, p. 72.] Therefore, no further mention will be made in this brief with respect to the same.

The only real ground of objection on the part of the appellee is with respect to the two automobiles—one a Packard sedan and the other a Nash roadster. The facts and circumstances relating to these two automobiles are substantially as follows:

Approximately some six months prior to the filing of the petition in bankruptcy schedules, appellant, the bankrupt, had entered into conditional sales contracts for the purchase of said automobiles with the Lindley Motor Co. These contracts were in the usual form of conditional sales contracts adopted by the automobile dealers in California, and provided that no title should pass to the buyer until full and complete payment of the contract price had been made. [Record, pp. 63-70.] At the time the

schedules were sworn to and filed the automobiles were not in the possession of appellant. [Record, pp. 30, 47.]

The first meeting of the creditors was held on the 27th day of April, 1927, at which time the trustee was appointed. A motion was made by appellant's attorney for leave to amend the schedules to include any interest appellant might have in said two automobiles, and schedule A-2 was amended under date of May 3, 1927. [Record, p. 36.] The bankrupt was not called for examination before the referee until the 24th day of May, 1927 [Record, p. 40], at which examination it developed that the appellant was buying these two automobiles on conditional sales contracts, and that they were not in his possession either at the time of filing of the schedules nor on the 24th day of May, 1927, the first day of his examination. [Record, pp. 24-25.] It also developed at the same hearing that there was about $1600.00 due on the Packard. [Record, p. 24.] The amount due at that time upon the Nash is not shown in the record. Possession of the automobiles was reacquired by the appellant on or about the 1st day of July, 1927 [Record, p. 32], and he finally lost possession of the same to the Lindley Motor Co. on or about the 8th day of October, 1927. [Record, p. 32.]

Between the time appellant reacquired possession of the automobiles and the time he finally lost the possession, he had paid about $1000.00 on the installments. The cars finally came to the possession of the trustee on a turnover order, he paying to the holder of the conditional sales contracts about $1100.00, and the two cars sold for $2050.00. [Record, p. 54.]

The trustee knew of the existence of these automobiles, but took no action to find out whether they were in the possession of the appellant or the seller under the conditional sales contracts between the first meeting of the creditors on the 27th day of April, 1927, and early in October of that year. [Record, p. 35.] He knew that the amended schedule A-2 under date of May 3rd, 1927, had been filed. [Record, p. 36.] He asked his attorney to investigate the matter early in May, but nothing was done about it until the middle of October. [Record, p. 37.] The petition for discharge was referred to James L. Irwin, Esq., special master, and objections thereto were filed by appellee Peters. [Record, pp. 6-10.] A hearing was had and the master overruled the objections and exceptions and reported to the court recommending the bankrupt's discharge. [Record, pp. 11-14.]

Exceptions were filed, which came on for hearing before the Honorable Wm. P. James, District Judge, and the exceptions were sustained and appellant denied his discharge. [Record, pp. 14-18; Record, pp. 72-73.] The question involved in this case is whether or not there was a wilful and fraudulent concealment by the bankrupt from his trustee of these two automobiles, and whether or not the bankrupt was guilty of false swearing on the hearing before the referee on the 24th day of May, 1927.

ARGUMENT.

I.

Appellant at the Time He Filed His Schedules Had No Title to the Automobiles in Question.

Each of the automobiles in question were purchased from the Earl Lindley Motor Company under a con-

ditional sales contract [Record, pp. 63-70], in which contracts, among other things, it was provided that the buyer (appellant) "will not permit the same to be removed from his possession; to be attached or replevined, nor create nor permit to be created any lien or encumbrance against the same on account of claims against him or for storage, repairs, or otherwise."

It was further provided that he "should not sell, attempt to sell, lease, mortgage, hypothecate or otherwise dispose of said personal property * * * or any of his rights hereunder, and any assignment of this contract or any of the purchaser's rights hereunder by the purchaser or by execution or other legal process, or otherwise, or the transfer thereof by process of law or otherwise, shall, at the option of the seller, terminate all rights hereunder to purchase said personal property."

Further, "in the event that the purchaser shall become financially involved or insolvent, or shall be adjudicated a bankrupt * * * the seller at his option and without notice to the purchaser, may elect to declare the whole purchase price immediately due and payable, or the seller may without notice to the purchaser declare all of the rights of the purchaser under this contract terminated, and without demand first made, and with or without legal process, may take possession of said personal property, wherever found, using all necessary force so to do, and hold the same discharged from further liability under this contract. * * * In the event the seller elects to take possession of said personal property, all of the rights of the purchaser under this contract shall immediately terminate and all payments theretofore made hereunder shall belong absolutely to the seller."

It was further provided that "until the purchaser has fully complied with all the terms, covenants and conditions of this contract, and made all of the payments as hereunder provided, said personal property, including all parts, accessories and equipment now or hereafter attached to or used in connection with said personal property shall belong to, and the title to said personal property shall remain in the seller. Possession of said personal property shall give the purchaser no title or interest therein and no rights except as herein provided. If the purchaser shall fully comply with all of the terms, covenants and conditions of this contract, and make all of the payments as herein provided, the seller agrees to give a bill of sale of said personal property to the purchaser and convey title to him."

It was further provided therein "time and each of its terms, covenants and conditions are hereby declared to be of the essence of this contract, and acceptance by the seller of any payment hereunder, after the same is due, shall not constitute a waiver by him of this or any other provision of this contract."

And that "this contract may not be enlarged, modified or altered except by endorsement hereon and signed by the parties hereto."

II.

Appellant at the Time He Filed His Schedules Had No Equity in the Automobiles in Question.

The value of the Packard car on the first of April, 1927, was about $1100.00; the balance due on it was $1016.76. The Nash car was worth about $950.00 and there was $976.56 due April 1st, 1927. [Record, p. 60.]

Some time after May 24 appellant regained possession of the automobiles and from that time down until they were finally taken from him paid about $1000.00 thereon. The cars were sold by the trustee and he realized for the estate about $900.00. [Record, p. 54.]

III.

The Automobiles in Question Were Not in His Possession at the Time the Schedules Were Signed and Filed.

They were repossessed by the seller on four different occasions. The first time was before the first of April, 1927. [Record, p. 57.] They had been out of his possession for about two weeks [Record, p. 47], and were in the warehouse of the Lindley Motor Co. in Pasadena on the 24th of May, 1927 [Record, p. 22], the day of appellant's first examination.

IV.

The Failure of Appellant to Schedule in the First Instance Was Upon the Advice of Counsel.

"Q. By the way, what was the reason you didn't schedule the cars in the petition in the first place? A. I was advised that I had no equity in them.

Q. Who advised you that? A. Mr. Morris.

Q. Was he your attorney at that time. A. Yes. sir." [Record, p. 49.]

"At the time I verified these schedules I had a conversation with my attorney relative to the automobiles. I don't remember just what I said to him, but he said that I had no equity in them and that they did not belong to me. I do not know that my defense is that I made a full and fair disclosure to my attorney. I don't remember what he said. He simply

said that they didn't belong to me; that I had no right to schedule them. I told him that I wanted to turn in everything I had and that I had these on sales contract. I did not tell him where they were. When we drew up the schedules I didn't know myself where they were. I told him the truth about them and I don't know now, at that date, what it was." [Record, p. 52.]

"Q. It was not a case on your part of forgetting the cars. That was the reason why they were not listed; you knew you had them? A. I could not tell because in the contract it said I had no rights and that they were not my property, and I was at a loss about it and I simply left it up to my attorney.

Q. But you don't remember what you told your attorney? A. I don't remember the exact conversation, no." [Record, p. 59.]

It is very apparent from this testimony that appellant gave his attorney as full information concerning the automobiles as a layman could, and after having made such full disclosure, and acting on the advice of his attorney, he failed to schedule the automobiles, there certainly can be no element of fraud charged to him by that act.

V.

Appellant Acted in Good Faith and Was Guilty of No Fraud.

Conditional sales contracts are recognized in this state to the fullest extent.

Van Allen v. Francis, 123 Calif. 474;

Oakland Bank v. Calif. Pressed Brick Co., 183 Calif. 295.

Whether a contract is one of conditional sale or of absolute sale, with reservation of title as security only, is to be determined by the law of the state where it is to be performed, and the decisions of the highest court of that state as to the construction of such a contract is binding on the bankrupt court.

Matter of Nader, 276 Federal 123.

Where under the state law the title to chattels sold may be retained by the seller pending full payment of the purchase price, and such reservation is good as against creditors, it is also good as against the trustee in bankruptcy of the buyer.

Matter of Farmers' Dairy Association, 234 Federal 118.

While it is true that the amendment of section 47 of the Bankrupt Act, which gave the trustee of the bankrupt "the rights, remedies and powers of a creditor, holding a lien by legal or equitable proceedings," it did not give the trustee the status of an innocent purchaser. He has no greater right than a judgment creditor.

A trustee in bankruptcy gets no better title than that which the bankrupt had and is not a subsequent purchaser, in good faith, within the meaning of section 112 of chapter 418 of the laws of 1897 of New York. And as the vendor's title under a conditional sale is good against the bankrupt, it is good also against the trustee.

Hewit v. Berlin Machine Works, 194 U. S. 296.

Inasmuch as by the law of the state of California, as construed by its Supreme Court, conditional sales contracts have been sustained to the fullest extent, the decisions above cited are authority for the contention we

are now making here. The bankrupt had no title. That was specifically reserved to the vendor. He had no interest which he could convey. He had a mere right of possession, and that is all. As we read it, that was held in the case of King v. Klein, 49 Calif. App. 696, where the court said "that the vendee under a contract of conditional sale acquired a defeasible interest in the property," and that is so even though a creditor might be placed in the shoes of the vendee upon tendering performance of all of the obligations of the vendee, an act which the creditor or the trustee in bankruptcy might perform without the assistance of the bankrupt (or vendee). Indeed, in the case at bar, had the bankrupt scheduled the automobiles in question that would immediately have been a violation of his agreement with the vendor and opened the door immediately for the vendor to repossess the cars, but would not have relieved the bankrupt of his obligation to make further payments on his contract. If by scheduling the automobiles the bankrupt thereby immediately lost his right of possession and gave the vendor the option to reclaim the cars at once, how can it be said that in scheduling the cars something of value would have passed to the trustee? Because it must be remembered that the absolute title vested in the vendor and that all payments made by the vendee up to that time would be forfeited and lost not only to the bankrupt but to his trustee.

This question was considered carefully by the bankrupt's attorney when the schedules were being made, and the court must assume that any lawyer in California would know, upon learning that these cars were held under a conditional sales contract, that there was neither title nor

equity in the cars which could pass to the trustee. Indeed, any layman of average intelligence, having entered into contracts like the two in question, must be presumed to have read the same and know their contents and could have come to no other conclusion himself than that until he had fully paid the contract price he had nothing but the right of possession, and, in our view, it makes no difference whether Mr. Merritt was able to disclose to the special master or not all that was said at the time the question of the scheduling of the automobiles was under consideration. There is certainly nothing in the record to show that the matter was not given consideration, and the advice which was given to him at that time, we respectfully submit, was a sufficient justification for his failure to so schedule them and is a refutation of the charge that there was a fraudulent concealment, and this is true whether the automobiles were in or out of the possession of the bankrupt at the time. There is no dispute that he lost possession of the cars on four different occasions, and there is no serious dispute that when he gave his testimony on the 24th of May, 1927, the cars were not in his possession, but, as we have above said, even though they were, the failure to schedule them was not done with any fraudulent intent. As was said by the special master [Record, pp. 54-55], "The fact that a man fails to schedule two automobiles, the title to which it might take a skilled lawyer to decide, or whether he really had any equity in the cars, is probably not sufficient ground to deny the discharge. * * * A great many lawyers might have advised the bankrupt not to schedule them. This is not such a concealment of assets as would be sufficient grounds for the denial of a discharge, as I see it at this time."

Again [Record, p. 61], the special master at the close of the hearing said, "I do not see anything to cause me to change my views as expressed yesterday. The only question is whether there is bad faith in not scheduling these automobiles and certain paintings, and, as I stated, a reasonably prudent man, or even attorneys, might differ whether property held on contract, that has already been returned, need be scheduled. This bankrupt did not have the title to these automobiles, as I understand it; they were not registered in his name. * * * He had no claim on the title. He might have had a very inconsequential equity in their value, but as it turned out, he had no equitable value, and apparently the trustee did not think there was any equity; and Mr. Moore is a very careful man, and he usually takes hold of everything that he thinks has any value; but he let it go on for months here until the bankrupt made more payments, making the cars more valuable to the estate, and then he took possession of them and sold them for only the amount that the bankrupt had paid on them since they were repossessed. So I can see no bad faith in not scheduling these automobiles. It probably would have been better practice to schedule them. * * * The whole thing hinges on whether there was any agreement between Mr. McDonald of the Finance Company or the Lindley Motor Company to return them; but the objecting creditor has made no attempt to show that."

While it is true that the learned judge took a different view of the case and decided adversely to appellant, we have not, however, been favored with any opinion—simply an order holding that the failure to schedule was fraudulent and denying the discharge. While it may be

true that the appellate court is not bound to give consideration to the views of the special master where they are in conflict with the views of the district judge, yet we contend that the referee in bankruptcy, who is in daily contact with witnesses and bankrupts, familiar with efforts at evasion of the law, skilled in observing the demeanor of witnesses who appear before him, is in a better position to sift the facts and get nearer to a true conclusion upon a question of good faith than the court with nothing but cold print before him. The referee, sitting as a special master, heard this particular controversy and had also heard the prior testimony of appellant when examined before him as referee, and had full opportunity to judge the character and demeanor of the witness.

Furthermore, the subsequent scheduling of the automobiles was allowed on the application of the bankrupt made before any question with respect to them had been raised. The first meeting of the creditors was held April 27th, 1927, at which time Mr. Moore was elected trustee. The bankrupt was first examined on May 24th, 1927. The automobiles were out of the possession of the bankrupt. He had lost his rights and his counsel upon reflection decided to give the trustee the opportunity to get something out of the cars if he could.

The bankrupt is not a business man. The examination of this record will disclose that he was trying to remember the facts and give them to the master according to his best recollection. I hold no brief for a bankrupt who attempts to evade the law, and will give no aid to one who seeks to perpetrate a fraud. This whole controversy arises by reason of the fact that the writer of this brief, in order to remove the shadow of a suspicion of an at-

tempt to evade the law, advised appellant to amend his schedule. This advice was given subsequent to that given by Mr. Morris, and after the schedules had been filed. It may not have been the wisest course to pursue. Appellant may be the victim of conflicting legal opinions, but the outstanding fact in this record is that he took the advice of each of his lawyers at the time the same was given, and acted on such advice. Surely it would be a harsh rule to invoke against appellant that he should be held to have committed a fraud when he was trying by the only way known to honestly follow the advice of his counsel. The learned district judge fell into a grave error, and the order and decree denying appellant's discharge should be reversed.

All of which is respectfully submitted.

NICHOLAS W. HACKER,
Attorney and Solicitor for Appellant.

No. 5493.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Lewis N. Merritt,
Appellant,

vs.

S. H. Peters,
Appellee.

APPELLEE'S BRIEF.

W. T. Craig,
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Attorneys and Solicitors for Appellee.

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APPELLEE'S BRIEF.

We regret at the outset of this brief, the necessity of correcting one of the vital portions of the statement of facts made by counsel for the appellant, a misstatement which we believe misled the Special Master on the argument before him and which caused him to make incorrect findings on the question of whether or not the bankrupt had the automobiles in his possession, and the correction of which caused the district judge to reverse the findings of the referee as being contrary to the evidence and to deny the bankrupt his discharge. There is no dispute of the fact that Lewis N. Merritt was adjudged a bankrupt on April 1, 1927, nor do we dispute the statement of counsel regarding the pictures left the bankrupt and his brother and sisters under the terms of the will

of Annette W. Merritt. Neither do we dispute the fact that the bankrupt was purchasing these automobiles during a period of approximately six months before bankruptcy, purchase being made under conditional sales contract.

We do, however, dispute the statement at the bottom of page 4 and top of page 5 of appellant's brief, "At the time the schedules were sworn to and filed, the automobiles were not in the possession of appellant," citing record, pages 30 and 47, for the reason that the bankrupt himself admitted that at the time that he verified these schedules in bankruptcy, he did not doubt for a moment but that he had these automobiles in his possession. [Record, page 52, beginning at line 17.]

The statement of counsel on page 5 of his brief that "Schedule A2 was amended under date of May 3, 1927," citing the record on page 36, is misleading to say the least. The record shows that the amendment to the bankrupt's schedules was not made on May 3, 1927, as stated by counsel, but was made on or subsequent to May 24, 1927, and if counsel saw fit to date his amendment back it is no concern of ours and in no way binding upon us. We refer the court to page 40 of the record wherein Mr. Hacker offers in evidence transcript of the proceedings of May 24, 1927, wherein he reads in evidence a portion of the transcript of the proceedings as Objecting Creditor's Exhibit No. 1, to show that on May 24, 1927, or later he amended the schedules. We therefore ask the court to take into consideration these two corrections which we deem vital, particularly the first one, relating to the possession of the automobiles at the time of filing of the petition in bankruptcy.

ARGUMENT.

We consider appellant's first point as being wholly without merit. Conditional sales contracts, like all other contracts, are made subject to the laws of the state and the laws of the United States, including the Bankruptcy Act. Section 47-A of the Bankruptcy Act reads in part as follows:

> "And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

Section 689-A of the Code of Civil Procedure of the state of California reads as follows:

> "Personal property in possession of the buyer under an executory agreement for its sale entered into after this section goes into effect may be taken under attachment or execution issued at the suit of a creditor of the buyer, notwithstanding any provision in the agreement for forfeiture in case of levy or change of possession." (New section added May 25, 1921; Stats. 1921. P. 391.)

Therefore under the provisions of section 47-A of the Bankruptcy Act and 689-A of the California Code combined, the provision in the conditional sales contract providing for forfeiture in the event of levy was an absolute nullity.

Appellant's second point falls of its own weight. By appellant's own statement of the fact, he concedes that

the Packard car was worth $1100.00 on April 1, 1927, with a balance due of $1016.76, leaving an equity of over $80.00 in the Packard. He also concedes that the trustee realized $900.00 on the two automobiles when he sold them, and it is no concern of ours that the bankrupt may have expended other money on the automobiles after he had attempted to conceal them from his trustee.

Arriving at point three of appellant's brief, we believe this to be the crux of the entire situation. The bankrupt took the witness stand as a witness in his own defense. On cross-examination he admitted remembering Mr. Lewis (attorney for one of the creditors) examining him in court relative to these automobiles on May 24th. He admitted that Mr. Lewis asked him if he had any automobiles and the kind of a car that it was, and that he answered. "Yes, and that he had paid about $3200.00 for it." [Record, page 50.] He admitted on cross-examination "that Mr. Lewis asked him if he was driving that car and that he said that he was and that he meant just what he said when he made that statement." [Record, page 51.] Further down on the same page we find his memory being further refreshed when he was asked if Mr. Lewis did not ask him the following questions:

"Q. Have you got it with you today?

A. No.

Q. Where is it?

A. In Pasadena.

'Q. What did you mean by that?

A. I suppose I meant it was in Pasadena instead of being here.

Q. Is it not a fact that car was repossessed two days after that examination?

A. I delivered the car rather than have the notoriety and publicity'." [Record, page 51.]

On page 52 of the record we find the amendment to the settled record relating to the bankrupt's admission that he had these automobiles in his possession at the time of the drawing of the original schedules in bankruptcy. In order that there may be no misapprehension as to the true facts regarding this admission, we shall set out for the court the questions and answers from the original reporter's transcript, the original record as prepared by counsel for the appellant and the amendment as asked for by appellee. The original reporter's transcript of the testimony reads as follows:

> "Q. It is a fact that at the time you drew the original schedules in bankruptcy and particularly that part relating to horses, carriages and other vehicles, that you had both of these automobiles in your possession?
>
> A. I don't doubt but that I did have them."

In settling the record, counsel for the bankrupt attempted to put this question and answer as follows:

> "At the time the original schedules were drawn I don't doubt that I had them in my possession."

The amendment proposed by counsel for the appellee read as follows:

> "On the same page (29), commencing at line 6, of the appellant's statement of evidence, correct to read:—
>
> At the time the original schedules were drawn, I don't doubt that I had these automobiles in my possession." [Transcript, page 105.]

This amendment was not allowed by the District Court, as we contend should have been done. If this court de-

sires it, or if counsel disputes the fact that the word "them" refers to automobiles, and not to schedules, we believe that the original reporter's transcript should be certified up in order that no dispute as to the significance of this vital admission may arise and no misunderstanding result therefrom.

The necessity for this amendment and the wisdom of it is patent on its face. The statement as made by counsel for the appellant standing alone, could very easily be construed to mean that at the time of drawing up the original schedules in bankruptcy, the bankrupt had the *schedules* in his possession, which would place an entirely different meaning on the damaging admission made by the bankrupt that at the time the schedules were drawn, he did not doubt but that he had these automobiles in his possession. Further down on page 52 of the record, we find the following:

> "Q. What did you mean by your answer on page 7 under date of May 24, 1927, when you were asked the question:
>
> 'Q. Are you driving that car?
>
> A. I am.'
>
> Q. What did you mean by your answer to that question?
>
> A. What date was that?
>
> Q. May 24, 1927, the second meeting here.
>
> A. If I could get the record, I could tell and I don't see why the Commercial Discount Company don't have it, because it would show exactly.
>
> Q. Here is the transcript of your answer as to that on May 24, 1927, and you knew at that time, the time you gave that testimony, whether or not you had possession of that car.
>
> A. I presume I did.

Q. What did you mean by saying that you were driving that car at that time, May 24, 1927?

A. I don't know. I don't know—I don't remember what I testified.

Q. As a matter of fact that car was in your garage at Pasadena on that date?

A. I don't know. I can't tell.

Q. What did you mean when you said it was in Pasadena?

A. I meant it was in Pasadena.

Q. Whereabouts in Pasadena?

A. I don't know.

Q. What did you mean by answering that question that way?

'Q. What other automobiles have you?

A. I have a Nash roadster my son uses.

Q. A Nash that your son uses?

A. Yes.

Q. Where did you get that?

A. I bought that from Earl C. Lindley.'

Q. Did you remember that testimony?

A. Yes."

We ask the court to note that in referring to the Nash roadster Mr. Merritt on May 24, 1927, over a month and a half after filing his petition and his adjudication in bankruptcy, says that he "has a Nash roadster that his son uses." It is significant that he refers to this Nash roadster in the present tense and not in the past tense.

On page 56 of the record counsel for the objector endeavored to get an explanation out of Mr. Merritt as to what he meant by his answer "I have a Nash roadster my son uses" and brings forth the lame explanation:

"A. I meant I had bought it for the use of my son.

Q. And your son used it at that time?

A. I don't know that, I couldn't tell you unless—and there must be some record that somebody can get that will show the exact dates those cars were in my possession and the exact dates that they were not in my possession."

The significant admission made by the bankrupt on page 57 would indicate that the alleged repossessions were only technical. The bankrupt on cross-examination stated as follows:

"A. I cannot tell when was the first time that I returned these automobiles to Earl C. Lindley. I know they were there four different times. The first time was before the first of April, 1927, and the cars were left there for several weeks. I cannot recall the date of the second time. Mr. McDonald asked me to leave the cars there until the payments were made up.

Q. Then at the time you turned these cars back to Mr. Lindley's garage, they were turned back with the understanding with the finance company that was holding the contract, that they would be left there until the payments were made up?

A. That was the way they talked to me." [Record, page 57.]

In the middle of page 58, we learn that this was not the first experience this bankrupt had had in the bankruptcy courts. A corporation in which he owned fifty per cent of the stock had gone into bankruptcy some years before. The bankrupt was an officer of the corporation and had been examined in the bankruptcy court in connection with that corporation's failure and that he knew it was the duty of a bankrupt to schedule all of

his assets, is admitted. On page 59 he evades the answer to the pointed question:

> "Q. And you knew at that time you verified these schedules that you had an investment of $2000.00 in these automobiles, did you not?
>
> A. I considered that with Mr. Morris and it was talked over as to the equity in it, or in them."

In connection with the strenuous contention of appellant and the finding of the Special Master:

> "That shortly prior to the bankruptcy the payments were delinquent and the cars were repossessed by the legal owner thereof" [Record, page 12],

the testimony is extremely vague and uncertain. A careful examination of the testimony of the three witnesses, who would know the facts, to wit: Earl C. Lindley, president of the Earl C. Lindley Motor Company, who sold the cars to Mr. Merritt, Frank McDonald, adjuster for the Commercial Discount Company, the finance company that purchased the contracts from Mr. Lindley, and Lewis N. Merritt, the bankrupt himself, would indicate that the first repossession of these automobiles took place on March 18, 1927, at which time the Commercial Discount Company had at least one of the automobiles in the Earl C. Lindley Motor Company's place of business for a period of approximately two weeks. [Testimony of Frank McDonald, record, page 61.] Of this alleged repossession, Mr. Lindley does not testify. It is significant to note that Mr. McDonald testifies that they "had the car in the Earl Lindley Motor Company's place of business about two weeks when we released it," and that the March payment was made which brought it down to April 5, 1927. Now this alleged repossession is easily

capable of mathematical calculation and reason. March 18, 1927, was on a Friday. Assuming that the car was kept exactly two weeks, it was then released to Mr. Merritt on April 1, 1927, *the very day of his adjudication in bankruptcy.* Certainly, reason would dictate that it was released prior to April 5, 1927, for no finance company that had been compelled to repossess one or more automobiles from a purchaser for nonpayment of his installments would release the car or cars back to him without being paid at least up to date. This, coupled with the bankrupt's admission that he "did not doubt that at the time of executing his schedules in bankruptcy, he had both of these automobiles in his possession" is especially significant, and leads to the reasonable conclusion that the Master was confused by the sleight of hand performance indulged in with regard to the possession of these automobiles by the Commercial Discount Company, the Earl Lindley Motor Company and the bankrupt.

The second repossession took place on April 18, 1927, as testified to by the witness McDonald on page 61 of the record. He says:

> "The second time we took it back was on April 18th. The April payment was then behind. The car was worth at that time $975.00 or $1000.00." [Record, page 61.]

The third "repossession" took place on May 26th, 1927. The witness McDonald testifies:

> "And the other time we took it back was on the 26th day of May. When we took it back in April we retained it approximately three or four weeks. I told Mr. Merritt that we were going to hold it for a reasonable length of time." [Record, page 61.]

It is especially significant that this repossession on the 26th day of May occurred two days after the disastrous examination held before the referee on May 24, 1927, at which the bankrupt testified that he did not have any automobiles and that the automobiles that he had been buying on sales contract were in the hands of Earl C. Lindley Motor Company. [Record, pages 24-25.]

The final repossession of these cars occurred on October 13, 1927, as testified to by the witness Earl C. Lindley. He says:

> "They came back into the possession of the Earl Lindley Motor Company on the 13th of October." [Testimony of Earl C. Lindley, record, page 23.]

Turning then to the trustee's petition for a turn over order and the order to show cause issued by Referee Earl E. Moss, at that time in charge of these proceedings, it is particularly significant to note that the bankrupt was required to show cause on the 14th day of October, 1927, at the hour of ten o'clock A. M., why an order should not be entered requiring him to turn over these two automobiles to his trustee. [Record, page 29.] Service of this order to show cause was admitted by N. W. Hacker and H. M. Tichner, attorneys for the bankrupt, on October 8, 1927. It is especially significant to note that these cars were again "repossessed" the day before the hearing on the turn over order before Referee Moss. Whether the bankrupt turned them back or whether the finance company's representative came and got them is immaterial. Tracing these cars and their possession is almost as bewildering as the old "shell game" at the county fairs of years gone by when the farmer was

asked to tell under which shell the little pea could be found. First they were with the bankrupt, then the dealer, then the finance company, then the bankrupt again and so on *ad infinitum*. In any event, whenever it suited the bankrupt's purpose, or his son's purpose, to use these cars, the dealer and the finance company seemed to have been strangely considerate and willing to return them, and when brought into court on any proceeding concerning them, they were always out of the bankrupt's hands, from the day of the first examination down to the time that he was compelled by order of the court to execute a transfer of them to the trustee. Taking into consideration the fact that this case was handled by two different referees, James L. Irwin, Esquire, the original referee in charge of the proceedings before whom the first examination was conducted and who finally passed on the application for discharge as Special Master, and Earl E. Moss, Esquire, the other referee in bankruptcy in Los Angeles, who handled the proceedings for turn over order, during the absence of Referee Irwin from the district, and further taking into consideration the lightning changes of possession of these cars by the various parties concerned, it is small wonder that error crept in in the Master's findings on discharge.

Insofar as the bankrupt's testimony is concerned, it is so vague and indefinite that were it not for his admission "that he did not doubt for a moment that at the time of filing his schedules in bankruptcy he had them in his possession" his testimony would be of no value whatsoever. On page 46 of the record he says:

> "I had delivered the cars on four different occasions at the request of Mr. McDonald because I

could not make the payments when they became due and I would deliver them to Lindley and leave them there until I could make the payments and I can't state, unless I can find the records showing those payments, what the dates were, and when I did get the money, I would go and pay up on the cars and take them and use them and that it not only happened once, but it happened four times; but only twice I think did they serve papers on me.

"Q. Were you contemplating filing a petition in bankruptcy when you delivered them the last time?

A. No, sir.

Q. And you can't approximate the length of time prior to the filing of your petition here, it was you delivered the cars?

A. No, sir.

Q. Whether it was the day before, a week before, a month before, or how long?

A. No, I couldn't. I wish I could find some records, but I have none myself. I tried to look over Mr. McDonald's records to see when I made the back payments, that would be the only way I would know." [Record, page 46.]

On page 48 we find the following:

"Q. How did you know he still had possession of them when you went after them the second time. Did you go to him in the meantime?

A. Mr. McDonald came to collect on them just the same whether I had the cars or not." [Record, page 48.]

The bankrupt here attempts to mislead the court into believing that the finance company could collect the payments even though they had repossessed the cars. Such a contention is absolutely foolish. Mr. Merritt was in

bankruptcy and his provable debts were in line to be discharged, regardless of whether they were for automobiles or anything else. Mr. Merritt knew this or he would not have gone into bankruptcy. And for him now to seek to contend that his reason for taking the cars back was that the finance company was still collecting installments after he had gone into bankruptcy and after they had repossessed the cars, is too ridiculous for further argument. It is our contention, and we believe it was the opinion of the learned district judge, that when Mr. Merritt went back to the Earl C. Lindley Motor Company in June, 1927, and paid up the April 5th and May 5th installments on his cars, he knew that the cars had "been held for a reasonable length of time" as Mr. McDonald testified. [Page 61.] His bankruptcy was in the hands of able and learned counsel and in view of the fact that he seems to have seen fit, according to his own admission, to have scrupulously consulted an attorney regarding omitting these cars from his schedules, it seems peculiar to us that he did not consult his counsel regarding an automobile finance company trying to collect installments from him on two cars which had been taken away from him and which were even then in their hands. If the situation were as Mr. Merritt would have us believe, his counsel would no doubt have assured him that the filing of his petition in bankruptcy had relieved him from liability for any deficiency under the conditional sales contracts which he had signed regardless of how favorable they might be to the finance company.

We believe that the Fourth and Fifth points urged by counsel may be consolidated under the question of whether or not the bankrupt acted in good faith and on

advice of counsel. We frankly admit that if the bankrupt acted in good faith and on advice of counsel, his discharge should not be denied, but we also contend that the burden was on him to prove good faith and advice of counsel even prior to the amendment of 1926, under which this case was handled. Section 14 B 7 reads in part as follows:

> "Provided, that if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this paragraph (b), would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt."

The objecting creditor had built up his case by proving the following facts:

First: That the bankrupt had filed his schedules on March 31, 1927, and had sworn to Schedule B2g of said schedules as follows:

> "Carriages and other vehicles, viz.: None."

[Specification of Objection No. 2, record, page 7, and testimony of Clara E. Larison, notary public, record, page 20], and that at the time of swearing to said schedules, the bankrupt had two automobiles, a Packard and a Nash, in his possession, which automobiles he was purchasing on conditional sales contract [Record, page 52].

Second: That at the time of his first examination in the referee's court on May 24th, he came down town in a car and on his examination was asked by Mr. Lewis:

"Q. Have you any automobiles?
A. No."

And further down at the bottom of page 24 of the record we find him admitting that on that date, May 24, 1927, he was driving the Packard car which he had purchased for $3200.00 and on which he had paid $1600.00. These two facts alone, the omission of these automobiles from his schedules and his undisputed possession of them on the date of his examination, indicate without question the commission of three offenses under section 29B of the Bankruptcy Act, concealment of the automobiles from his trustee, false swearing in his schedules and false swearing on his examination, when he swore that he had no automobiles. A complete case was established against him, and, standing undisputed, these facts should serve to convict him beyond all reasonable doubt. The burden then shifted to him and he advanced the defense that he had acted in good faith and on advice of counsel.

It is well established that in order to maintain the defense of advice of counsel it is necessary that the person seeking to establish this defense show that he made a full, fair and complete disclosure to his counsel of all of the facts on which he sought the advice. What did the bankrupt show? Nothing whatsoever except a naked, unsupported statement by himself that his attorney advised him to leave these automobiles out of his schedules. He says at page 52 of the record:

> "At the time I verified these schedules I had a conversation with my attorney relative to the automobiles. I do not remember just what I said to him. He said that I had no equity in them and that they did not belong to me. I do not know that my de-

fense is that I made a full and fair disclosure to my attorney. I don't remember what he said. He simply said that they didn't belong to me, that I had no right to schedule them. I told him that I wanted to turn in everything I had and that I had these on sales contracts. I did not tell him where they were. When we drew up the schedules I didn't know myself where they were. I told him the truth about them and I don't know now at that date what it was." [Record, page 52.]

On page 58, we find the following:

"Q. You knew, however, that it was the duty of a bankrupt, did you not, to schedule all of his assets?

A. Yes. I had that common knowledge. I know it is the duty of the bankrupt to schedule all of his assets.

Q. And you knew, at the time you verified these schedules that you had an investment of $2000.00 in these automobiles, did you not?

A. I considered that with Mr. Morris and it was talked over as to the equity in it, or in them.

Q. Did you not testify here yesterday that you did not remember what conversation you had with Mr. Morris and that you could not tell the court what you told Mr. Morris and what Mr. Morris told you?

A. I told you I couldn't tell what I—what we talked about, my recollection is that he advised me that he had—that that was the way to handle it.

Q. As a matter of fact you were worried enough about the cars to consult your attorney about them?

A. Well, Mr. Morris and I went through everything.

Q. It was not a case on your part of forgetting the cars; that was not the reason why they were not listed; you knew you had them.

A. I couldn't tell, because in the contracts it said I had no rights and that they were not my property and I was at a loss about them and I simply left it up to my attorney.

Q. But you don't remember what you told your attorney?

A. I don't remember the exact conversation, no." [Record, pages 58-59.]

The above, when coupled with the bankrupt's version of the alleged consultation at page 52, and his damaging admission following, disposes of this defense.

> "The schedules were amended subsequently on the advice of Mr. Hacker. At the time the original schedules were drawn, I don't doubt that I had them in my possession." (Referring to the automobiles) (Parentheses ours.) [Record, page 52.]

> "Advice of counsel, if asked for and acted on bona fide, is valid evidence to negative fraudulent intent and knowledge on the bankrupt's part in omitting assets from schedules, or otherwise not revealing them.
>
> But advice of counsel will not excuse an omission of assets from the schedules where there were no substantial legal questions involved and the actual legal relation of the property to the bankrupt's estate was matter of common knowledge and plain to everybody. Nor will it excuse where the facts were not fully laid before counsel." (Remington on Bankruptcy, Vol. 7, sections 3243-3244.)
>
> Renmers v. Merchants Leclead National Bank, 173 Fed. 484, 23 A. B. R. 78. C. C. A., Missouri.

In the matter of Breitling, 133 Fed. 146, 13 A. B. R. 126, we find a situation almost parallel with the instant

case. In the Breitling case the bankrupt omitted from his schedules an order from the Waldheim Cemetery Company for $40.00 worth of lumber given shortly before bankruptcy. At the time he filed his petition he was ignorant of the fact as to whether the lumber had been delivered from his yard to the company or not. The district judge found that he had conferred with his counsel, Messrs. Guthrie and Palmer, concerning this matter and that he was ignorant of the fact that the lumber was still in his possession and, acting under their advice, he did not schedule it. Two days after he filed his petition in bankruptcy he collected the amount paid for the lumber and applied it on costs and attorney fees and the district judge held that the bankrupt was relieved of fraudulent intent for the reason that he had acted on advice of counsel. The District Court found that his attorneys had advised him that he was entitled to this money, inasmuch as he had been entitled to exemptions of $400.00 anyway, and granted the discharge. On appeal the United States Circuit Court of Appeals for the 7th Circuit said:

> "The Act required the fullest disclosure the utmost good faith, the surrender of all his estate not exempt under the Act. It is well observed by Judge Brown that: 'A discharge in bankruptcy upon any other condition than the complete appropriation of every known asset legally available to the creditors, would not only be a glaring wrong to creditors, but contrary to every conception of a just system of bankruptcy.' (*In Re* Beaudoine, 96 Fed. 536-539, 3 A. B. R. 55.) If it be doubtful whether a specified item of property should go to creditors or be reserved by the bankrupt, it is not for him to constitute himself the judge, concealing the fact, but it is his duty

to disclose the transaction, that the bankruptcy court may determine the right. (*In Re* Gaily, 127 Fed. 538, 11 A. B. R. 539.)

"Without question the claim against the Waldheim Cemetery Company should have been scheduled. This the referee concedes in his report. It was knowingly and designedly omitted by the bankrupt. This is conceded by him. But he insists it was so done upon the advice of counsel. But advice of counsel cannot excuse violation of law. It may mitigate the act according to the character of the advice and circumstances under which it is given. If the omission here were in the exercise of a supposed right under advice taken and given in good faith, the bankrupt might be absolved of the charge of making a false oath or of designedly concealing his estate from his creditors. To work such result, however, the facts must be fully and in good faith stated to counsel and the act charged done innocently and believing that he had been correctly advised."

Further down in the same opinion in the last paragraph the court says:

"This question of fact rests upon the statement of the bankrupt. It does not satisfactorily appear that he fairly presented the case to his counsel, or that his counsel advised him that he was entitled to retain the account as exempt, in addition to the $400.00 of exemptions claimed, or that he could properly omit it from the schedules. We should be loathe to believe that counsel could so have advised him and he has not called upon them to verify his statement, weak and inconclusive as it appears. The facts here, which are fully established lead us to the conclusion that the bankrupt purposely retained and concealed from his creditors that to which he was

not entitled and knowingly made false oath to his schedules. The amount involved, it is true, is small, but the design to conceal was deliberate and is clear. We are indisposed to give countenance in the slightest degree to any act which shall withhold from creditors any part of the estate of a bankrupt which lawfully he should devote to the payment of his debts.

The decree is reversed." (*In Re* Breitling, 133 Fed. 146, 13 A. B. R. 126, C. C. A., Illinois.)

In the courts of California, we find the rule requiring full, fair and honest disclosure of the facts to be the same.

"The defendant, in malicious prosecution, cannot maintain the existence of probable cause in law by proving that he acted upon the advice of counsel, unless he shows that he made to such counsel before receiving the advice, a full, fair and honest statement of the facts then known to him bearing upon the guilt of the accused person." Stone v. Wolfe, 168 Cal. 261, citing Dawson v. Schloss, 93 Cal. 202, 29 Pac. 31; Dunlap v. New Zealand, etc. Co., 109 Cal. 371, 42 Pac. 29; Bliss v. Wyman, 7 Cal. 257; Wild v. Odell, 56 Cal. 136. Also see Burke v. Watts, 188 Cal. 119.

In Auner v. Norman, 29 Cal. App. 425, the defendant testified:

"I disclosed to him (Conkey) fairly and truthfully all of the facts that were within my knowledge concerning the matter of the charge against Mr. Auner at that time and before filing the criminal complaint."

This statement the District Court of Appeal for the Second Appellate District of the State of California held

insufficient to justify the defense. There are dozens of other authorities holding the same way, but we believe it unnecessary to cite any more decisions. As to the case of *In Re* Breitling, 133 Fed. 146, 12 A. B. R. 126, one could search the records through and we do not believe it would be possible to find a case more closely in point throughout. In the Breitling case the bankrupt did not know whether or not he had the lumber in his possession at the time of filing his schedules. In the instant case Mr. Merritt claimed he did not know where the automobiles were at the time of filing his schedules. In the Breitling case, Mr. Breitling consulted his attorney and claims he was advised to omit the lumber from the schedules. Mr. Merritt says the same thing regarding the automobiles. In the Breitling case, two days after bankruptcy the bankrupt collected $40.00 from the cemetery company and applied it on his attorney fees and costs. In the Merritt case, Mr. Merritt applied the $2105.55 that he had in these automobiles, prior to the filing of the petition in bankruptcy, on the alleged "repurchase" price when he went to the Lindley Motor Company in June, two months after filing his petition in bankruptcy, paid up the installments that were due on April 5th and May 5th, and converted them to his own use and benefit. In the Brietling case, the bankrupt was unable to tell anything about the conversation had between himself and his attorney, except that the attorney advised him "that he was justified in making that sale and not putting it in." In the Merritt case the bankrupt cannot remember what he told his attorney or what his attorney told him, except that he was buying some cars on conditional sales contract and that his attorney told

him he need not schedule them. In the Breitling case the defense of counsel was advanced on the naked, unsupported testimony of the bankrupt. In the Merritt case we have a similar situation. The bankrupt in the proceeding in the District Court was represented by attorneys Nicholas W. Hacker and Harry M. Ticknor. In this court he is represented by Mr. Hacker alone. Nowhere in the record does Mr. Morris' name appear as an attorney. He was not called as a witness on behalf of the bankrupt, so his testimony is conspicuous by its absence. He was not present at the examination of the bankrupt, nor was he present with Mr. Hacker at the trial of the opposition to the discharge. In the Breitling case the Circuit Court of Appeals seemed to think that it was essential that the attorney at least corroborate the fantastic tale told by the bankrupt in order to have it believed. The situation here, we believe, required that in order to sustain the defense, it was the bankrupt's duty to call Mr. Morris and let him tell from the witness stand just what the bankrupt told him regarding the situation and what advice he gave the bankrupt.

For the objecting creditor to attempt to call Mr. Morris would be as unethical as it would be foolish. Communications between Mr. Morris and the bankrupt would be privileged and the objecting creditor would not be permitted to examine him regarding conversation and disclosures made to him in his professional capacity. The bankrupt, however, had a perfect right to call Mr. Morris to corroborate his lame and halting excuse. This he failed to do, although the trial on the opposition continued over two different days. We are confident that Mr. Morris would never have given this bankrupt such

foolish and silly advice if the facts had been disclosed to him truthfully, if in fact he ever really gave the advice. We have only the bankrupt's unsupported version of it and nothing else. It was within the bankrupt's power to fully enlighten the court in this regard and this he failed to do. He should therefore suffer the consequences. (Schmidt v. Union Oil Co., 27 Cal. App. 366.)

It is our contention that in order to sustain the defense of advice of counsel, it was necessary for the bankrupt to prove affirmatively that he had full and fairly stated to his counsel:

(1) That on March 31, 1927, when he was about to file his schedules he had in his possession a Packard sedan, worth $2176.14, on which he had paid a down payment amounting to $651.00 on October 5, 1926, and had made monthly payments of $84.73 thereon on November 5th, December 5th, January 5, 1927, February 5th and March 5th, and that he had a Nash roadster which he had purchased on October 5, 1926, for $2088.84, with a down payment of $624.00 and had made monthly payments of $81.38 each, on November 5th, December 5th, January 5, 1927, February 5th and March 5th, making total payments on both automobiles of $2105.55. He should have further told his counsel that his payments were paid up to six days beyond the date of the verification of these schedules. He should have told him that he was driving one of the automobiles and his son was driving the other. [Record, page 25.] He should have shown the conditional sales contract to his counsel and he should have told his counsel that no installments were then due or past due on said automobiles.

(2) He should have proved on the hearing of the opposition to the discharge that Mr. Morris, with all these facts in his possession, had advised him that his $2100.00 equity in these automobiles was a nullity; that he was not required to schedule it as an asset and that he had a right to keep and retain these automobiles without disclosing his equity to the trustee.

As to his failure to prove these essential facts, the record speaks for itself. Counsel for the objector was more than fair in this respect in giving the bankrupt an opportunity which his own attorney had overlooked, to fully and fairly disclose to the court on cross-examination what he had told Mr. Morris. But, notwithstanding the effort of counsel for objecting creditor to bring out the conversation, for some reason or other the bankrupt did not see fit to disclose it. This defense therefore, we contend, falls of its own weight.

The Bankrupt Had an Equity in These Automobiles and the Trustee Was Entitled to Any Equity Which the Bankrupt Might Have Had Therein, Regardless of the Fact That the Contracts Provided for Retention of the Title by the Vendor.

It is true that the bankrupt did not have the legal title to these automobiles. He did however have the registered title to both cars under the Motor Vehicle Act of the State of California, and he had also an equitable title to the extent of paid installments. This equity passed to the trustee and the trustee had a right to salvage the equity for the benefit of the general creditors by paying the balance due on the automobiles and selling them for the benefit of the bankrupt estate. Con-

cealment of anything beneficial to the bankrupt, however small the value, constitutes a concealment in bankruptcy and a ground for the denial of a discharge.

> "The offense of fraudulently concealing assets is committed where the bankrupt dishonestly applies money or property to his own use and purposes, so that he himself or some other person whom he may desire to benefit receives advantage and profit by the concealment." (Collier on Bankruptcy, 13th Edition, volume 1, page 899.)

It is true that counsel for appellant contends that the bankrupt's equity in these automobiles at the time of filing his petition in bankruptcy was a nullity. This contention however is refuted by the bankrupt's own subsequent conduct, which argues against him louder than our words. If the bankrupt did not have these cars in his possession at the time of filing his schedules in bankruptcy and the cars had been repossessed two weeks before bankruptcy and were entirely out of his possession, and his rights therein forfeited, as he now seeks to claim, we ask the court to consider why he found it necessary to consult his attorney relative to scheduling them. We also ask the court to consider why, if the bankrupt's equity was of no value whatsoever, he saw fit shortly after the filing of his petition in bankruptcy, to borrow $500.00 from a bank to make the payments which had fallen due on April 5th, five days after his adjudication and May 5th, thirty-five days after his adjudication. The bankrupt had gone into bankruptcy for the purpose of clearing up his indebtedness. Why plunge himself $500.00 into debt, even before his estate was administered, for the purpose of salvaging a worthless equity

in two pleasure cars, if, as he contends, the equity was of no value whatsoever? These automobiles were not repurchased under a new contract. The bankrupt took advantage of the $2100.00 equity which he had in these automobiles at the time of his adjudication and merely resumed his payments, after he thought he had deceived and misled the trustee into believing that the automobiles had been irrevocably forfeited. He did not show where he ever communicated to his trustee in bankruptcy the fact that he had the right and privilege of redeeming these automobiles by making up these back payments. He thereby deceived his trustee and creditors and concealed from them a substantial equity which he deemed it to his advantage to save for his own use and benefit. We refer the court to the record, page 50:

> "Q. I believe you testified on your direct examination that you repurchased these cars from the Earl C. Lindley Motor Company; what was the repurchase price?
>
> A. Well, I said at the time that I did not know whether you would call it a repurchase or not. I went and made a deal with Mr. McDonald on it. Mr. McDonald told me that if I could make payments there would be no objection to my taking the cars. I do not know when that was. There was two months due then."

There is no question but that the trustee had a right to pay up the balance due on these automobiles under General Order No. 28 of the Bankruptcy Act and sections 689A and 689B of Code of Civil Procedure of California, and with this right vested in the trustee the bankrupt was guilty of wilful concealment and perjury throughout the entire proceeding.

Counsel strongly stresses the argument that the bankrupt's effort to file amended schedules and the filing of them and turning over the property to the trustee more than six months after adjudication, when brought in on an order to show cause, tends to purge him of any wrong committed by him. This he cannot do.

> "After he returned from Canada, the bankrupt by leave of the court, filed an amended schedule of assets which included those which he is charged with having concealed, and counsel argues that this related back to his original schedule and operated as an atonement which, being made while the proceedings were yet in progress, redeemed his fault, so that in the end nothing was concealed from the trustee. But we are unable to agree that it would have such an effect. The offenses of false swearing and concealment when once committed could not be retrieved by right and lawful conduct and the doing of things 'meet for repentance,' however they might affect the judgment of the court in imposing sentence." (Kern v. United States, 169 Fed. 617, 22 A. B. R. 223, U. S. C. C. A. 6th Ct.)

CONCLUSION.

We respectfully submit to the court that this is not the usual type of bankruptcy case. We respectfully submit that Lewis N. Merritt is not an unfortunate impecunious debtor burdened down with a load of debts far beyond his ability to pay. On the contrary Mr. Merritt is an unusually fortunate man. Thanks to the foresight of his mother, he is blessed with a spendthrift trust income of $575.00 per month, or approximately $7,000.00 a year from her estate. Contrary to the statement of counsel, the bankrupt is not a man without education or business

experience. The record shows that he is a traveling salesman by profession; that he has been in business before, under the name of Lewis N. Merritt Company, a corporation in which he owned fifty per cent of the stock and was an officer. He was at the time of the trial of the opposition to his discharge acting as guardian of his father. He was not paying any house rent out of his income of $575.00 per month. [Record, pp. 56-57.] There are thousands of hard working honest young men of Mr. Merritt's age in the state of California who would be highly pleased to be able to earn one-third of the income which goes to Mr. Merritt, through no effort of his own, each month. He admits that he knew the duties and obligations of a bankrupt from his experience in putting the Lewis N. Merritt Company through bankruptcy. Seeking now to unload his responsibility for several thousands of dollars worth of personal debts, and to avoid paying these debts out of his princely life income, Mr. Merritt did not even come into the bankruptcy court with clean hands this time and surrender his non-exempt property in order that his creditors might realize the pitifully small dividends that would result therefrom. On the contrary he sought to salvage his equity in these two automobiles and in his desperate attempt to do so, he twice committed perjury. If his equity was worthless, he had nothing to lose by scheduling it in his schedules and giving the trustee an opportunity to abandon it, after due investigation. When unmasked he deceived his trustee and creditors by falsely pretending that the cars had been repossessed and without disclosing to his trustee the fact that such repossession was purely figurative and technical and that he had a right to

vitiate it by paying up the delinquent installments. When driven to the wall with a turn-over order, returnable October 14th, before Referee Moss, he returned the cars the day before the hearing, on October 13th. When the trustee's back was turned. throughout the entire proceeding, Mr. Merritt reclaimed the cars and continued to drive them. The moment the trustee became vigilant or suspicious the cars were always "repossessed." During the alleged "repossession" he does not deny that he was driving the cars. The conclusion that he intended to defraud his creditors is inescapable.

It remains for this court to determine whether a bankrupt purchasing automobiles worth $4200.00 with a substantial equity therein of over $2100.00, can retain his equity as against the trustee in bankruptcy and take advantage of that equity in recovering the automobiles after adjudication. We do not believe that this court will so hold, any more than did the district court. In this day and age with installment sales the rule, rather than the exception, we do not believe this court would be prepared to hold that a contractor, for example, could purchase a fleet of trucks worth say $30,000.00, on contract, pay $25,000.00 of the purchase price, go through bankruptcy, concealing his equity on the grounds that the automobile sales company had reserved the title until all payments were made, and after his adjudication, by borrowing money, pay up the other $5,000.00 and resume operations free from all of his general debts after being granted a discharge.

We have found this bankrupt assuming inconsistent positions throughout, blowing both hot and cold in the same breath. We find him at one time saying that his

equity in these automobiles on April 1, 1927, was of no value whatsoever, and we then find him admitting that he borrowed $500.00 from a bank shortly after his adjudication to pay up the delinquent installments on them.

We conclude this brief by setting out the language of Judge Cox of the Northern District of New York in the matter of Charles W. Becker:

> "A discharge is intended to relieve misfortune, but it must be misfortune coupled with absolute honesty. It is the reward the law grants to the bankrupt who brings his entire property into court and lays it without reservation at the feet of his creditors. This much the law demands. Where it is evident that he is scheming to be relieved of his debts withholding property which should be applied to their payment, he is not entitled to consideration from the court of bankruptcy. The discharge is denied." (*In Re* Becker, 106 Fed. 54.)

We respectfully contend that this bankrupt is not entitled to the act of grace which he now seeks at the hands of this court. That a bankrupt seeking to avoid payment of his debts, should, in so far as his bankruptcy is concerned, "possess a character above reproach," we believe will be undisputed. This we respectfully submit this bankrupt does not possess. The district judge to whom the Bankruptcy Act gives the right to grant or deny a discharge has so found. (Bankruptcy Act, section 14B.) It is true that the referee to whom this matter was referred for the purpose of taking testimony gave the bankrupt the benefit of the doubt, which we contend is contrary to the spirit of section 14 B 7 of the Act as amended on May 27, 1926. However, the

referee's findings are not conclusive on the district court. The application for discharge must, under section 14 of the Bankruptcy Law and General Order in Bankruptcy No. 12, section 3, be heard and decided by the judge of the court. The referee has no jurisdiction to determine the question, but the court may refer the case to him generally for report. He aids the court like a master in chancery. He can not finally determine the question of discharge or no discharge, but he may be ordered to report the fact and his recommendation or conclusion as to the matter. This is merely to aid the judge, and the court then determines the matter. *In Re Rauchenplat,* 9 A. B. R. 763, unreported in Federal Reporter; *In Re* Grosberger v. B. F. Goodrich Rubber Company, 7 A. B. R. 742, U. S. C. C. A. 3rd Ct.

The discretion of the judge should not be interfered with except in a case amounting to an abuse thereof. Woods v. Little, 143 Fed. 229, 13 A. B. R. 742. U. S. C. C. A., 3rd Ct.

Respectfully submitted,

W. T. Craig,

Thomas S. Tobin,

Of Counsel.

Solicitors for Objecting Creditors.

No. 5494

United States
Circuit Court of Appeals
For the Ninth Circuit.

LEE SAI YING, *alias* LEE HUNG CHONG,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Plaintiff, United States of America:

SANFORD B. D. WOOD, United States District Attorney.

CHARLES H. HOGG, Assistant United States District Attorney, Territory of Hawaii.

For Defendant, Lee Sai Ying, *alias* Lee Hung Chong:

LESLIE P. SCOTT, Stangelwald Building, Honolulu, Hawaii. [3*]

[Endorsed]: In the United States District Court for the Territory of Hawaii. No. 5564. The United States of America, Plaintiff, vs. Lee Sai Ying, *alias* Lee Hung Chong, Defendant. Enlargement of Time for Docketing Case. Filed February 28, 1928, at 3 o'clock and 30 minutes P. M. Wm. L. Rosa, Clerk. L. Langwith, Deputy Clerk. [14]

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*Page-number appearing at the foot of page of original certified Transcript of Record.

In the United States District Court for the Territory of Hawaii.

No. 5564.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEE SAI YING, *alias* LEE HUNG CHONG,
Defendant.

ENLARGEMENT OF TIME TO AND INCLUDING MARCH 28, 1928, FOR DOCKETING CASE.

For good cause shown, the time within which to docket this case and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, is hereby enlarged and extended to and including March 28, 1928.

Dated at Honolulu, T. H., February 28, 1928.

WILLIAM T. RAWLINS,
Judge, United States District Court, Territory of Hawaii. [15]

[Endorsed]: In the United States District Court for the Territory of Hawaii. 5564. The United States of America, Plaintiff, vs. Lee Sai Ying, *alias* Lee Hung Chong, Defendant. Complaint for Deportation Under the Chinese Exclusion Act. Filed May 18/27, at 2 o'clock and X minutes P. M. (S.) Wm. L. Rosa, Clerk.

I hereby order a bench warrant to issue forthwith on the within complaint for the arrest of the defendant therein named, bail being hereby fixed at $2,500.00.

(S.) WILLIAM T. RAWLINS,
Judge, United States District Court, Territory of Hawaii. [16]

In the United States District Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEE SAI YING, *alias* LEE HUNG CHONG,
Defendant.

COMPLAINT FOR DEPORTATION UNDER THE CHINESE EXCLUSION ACT.

United States of America,
District of Hawaii,—ss.

On this 18th day of May, 1927, before me, William T. Rawlins, Judge of the United States District Court in and for the Territory of Hawaii, personally appeared George A. Erbs, who, by me being first duly sworn, on oath, deposes and says as follows:

That he is a duly qualified and acting Immigration Inspector of the United States of America for the Territory of Hawaii; that Lee Sai Ying, *alias* Lee Hung Chong, is a person of Chinese descent and a Chinese laborer within the United States and within the jurisdiction of the United States Dis-

trict Court for the Territory of Hawaii without the Certificate of Residence required by the Act of Congress entitled "An Act to Prohibit the Coming of Chinese Persons to the United States," approved May 5, 1892, as amended November 3, 1893; that the said Lee Sai Ying, *alias* Lee Hung Chong, on or about the 6th day of December, 1922, did unlawfully obtain admission into the United States at the port of Honolulu by false and fraudulent representations and claim of United States citizenship made before the immigration officials at the said port of Honolulu; and that the said Lee Sai [17] Ying, *alias* Lee Hung Chong, is not lawfully entitled to be or remain in the United States, in violation of the Acts of Congress in such case made and provided.

WHEREFORE, this affiant and complainant prays that a warrant be issued directing the Marshal of this District, or his deputy, to arrest the said Lee Sai Ying, *alias* Lee Hung Chong, and bring him before this Court in order that he may be dealt with according to law and statutes in such case made and provided.

(S.) GEORGE A. ERBS.

Subscribed and sworn to before me this 18th day of May, A. D. 1927.

(S.) WILLIAM T. RAWLINS,

Judge, United States District Court, Territory of Hawaii. [18]

PROCEEDINGS, PRESENTATION OF COMPLAINT, ARRAIGNMENT, PLEA OF NOT GUILTY AND ORDER SETTING CAUSE FOR TRIAL.

From the Minutes of the U. S. District Court, for the Territory of Hawaii.

Wednesday, May 18, 1927.

(Title of Court and Cause.)

MINUTES OF COURT—MAY 18, 1927—ORDER GRANTING MOTION FOR LEAVE TO FILE INFORMATION AND SETTING CAUSE FOR TRIAL.

On this day came the United States by its Assistant District Attorney, Mr. C. H. Hogg, and also came the defendant in person and without counsel, and this cause was called for hearing on motion for leave to file information charging violation of the Chinese Exclusion Act. Upon due hearing said motion was granted, the defendant arraigned and a plea of not guilty entered by said defendant, whereupon the Court ordered that this cause be set for trial May 24, 1927, at 9 o'clock A. M. [19]

PROCEEDINGS AT TRIAL, ORDER OF CONTINUANCE FOR FURTHER TRIAL.

From the Minutes of the U. S. District Court for the Territory of Hawaii.

Wednesday, June 8, 1927.

(Title of Court and Cause.)

MINUTES OF COURT—JUNE 8, 1927—TRIAL (Continued).

On this day came the United States by its Assistant District Attorney, Mr. C. H. Hogg, and also came the defendant with his counsel, Mr. Leslie Scott, and this cause was called for trial. Thereupon George A. Erbs was called and sworn and testified on behalf of the prosecution. The defendant was then called and sworn and testified on behalf of the prosecution. Wm. A. Brazie was called and sworn and testified on behalf of the prosecution. Defendant's Exhibit 1 was admitted in evidence, marked and filed. George A. Erbs was recalled and gave further testimony on behalf of the prosecution. Prosecution's Exhibit "A" was admitted in evidence, marked and filed. The time for adjournment having arrived, the Court ordered that this cause be continued to June 9, 1927, at 9 o'clock A. M. for further trial. [22]

PROCEEDINGS AT FURTHER TRIAL, CASE SUBMITTED.

From the Minutes of the U. S. District Court, for the Territory of Hawaii.

Thursday, June 9, 1927.

(Title of Court and Cause.)

MINUTES OF COURT—JUNE 9, 1927—ORDER SUBMITTING CAUSE.

On this day came the United States by its Assistant District Attorney, Mr. C. H. Hogg, and also came the defendant in person and with his counsel Mr. Leslie Scott, and this cause was called for further trial. Thereupon Valentine K. Richards was called and sworn and testified on behalf of the Government. Geo. E. Erbs was recalled and gave further testimony. The Government then rested whereupon counsel for the defendant also rested. Argument was then had by respective counsel and thereafter the Court took the cause under advisement. [23]

PROCEEDINGS, DECISION OF COURT, ORDER FIXING BOND.

From the Minutes of the U. S. District Court, for the Territory of Hawaii.

Tuesday, September 27, 1927.

(Title of Court and Cause.)

MINUTES OF COURT—SEPTEMBER 27, 1927—DECISION AND ORDER FIXING BOND.

On this day came the United States of America by its Assistant District Attorney, Mr. C. H. Hogg, and also came the defendant with his counsel, Mr. Leslie P. Scott, and this case was called for decision. Thereupon the Court ordered that the above-named defendant be deported to China, the country whence he came. Mr. Scott entered an exception to said ruling, which exception was allowed by the Court. Thereafter the findings, judgment and order of deportation was filed, bond fixed in the sum of $5,000.00, and the defendant remanded to the custody of the United States Marshal, pending filing of bond. [24]

[Title of Court and Cause.]

INDEX TO WITNESSES:

For Government:

[Endorsed]: Filed May 4th, 1928, at 9 o'clock and X minutes A. M. [25—1]

[Title of Court and Cause.]

PROCEEDINGS HAD JUNE 8, 1927.

Transcript of testimony and proceedings in the above-entitled matter, taken before the Honorable William T. Rawlins, Judge, United States District Court, Territory of Hawaii, at Honolulu, T. H., on Wednesday, June 8, 1927, at 9 o'clock A. M., Charles H. Hogg, Esq., Assistant United States Attorney, representing the United States of America, and the defendant being present in person and represented by his attorney Leslie P. Scott, Esq., R. N. Linn, official court reporter, present.

WHEREUPON, the following proceedings were had and testimony taken, to wit:

TESTIMONY OF GEORGE A. ERBS, FOR THE GOVERNMENT.

GEORGE A. ERBS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HOGG.)

Q. Please state your name. [26—2]

A. George A. Erbs.

Q. What is your official position, Mr. Erbs?

A. I am Immigration Inspector at the Immigration Station, Honolulu.

Q. How long have you been such official, approximately? A. About three years.

Q. Are you acquainted with that gentleman over there,—the defendant in this case? A. Yes.

Q. Mr. Lee Sai Ying? A. Yes, sir.

Q. Do you know whether or not he is a Chinese person?

A. He informed me that he was of the Chinese race.

Q. He informed you in person. When did he do that?

A. On or about the 7th or 8th of May, last.

Q. Do you know what his business, following or occupation is?

A. I believe he told me that he was a laborer.

Q. He told you that he was a laborer?

A. Yes.

(Testimony of George A. Erbs.)

Q. Where did you find him?

A. At 1015 Maunakea Street.

Q. In this city? A. Yes, sir, Honolulu.

Q. Do you know whether or not he has the certificate of residence required by the Act of 1892, amended by the Act of 1893?

A. I know he told me that he had a certificate. [27—3]

Q. Did you ask him for one?

A. Certificate of residence? No.

Cross-examination.

(By Mr. SCOTT.)

Q. When was it that the defendant informed you that he was a Chinese merchant, Mr. Erbs?

A. He never informed me that he was a Chinese merchant.

Q. A Chinese person? A. Yes.

Q. He told you that he was a laborer?

A. Yes.

(Witness excused.)

TESTIMONY OF LEE SAI YING, FOR THE GOVERNMENT.

LEE SAI YING, the defendant, called as a witness for the Government, being first duly sworn, testified as follows: (Through the official Chinese interpreter).

Direct Examination.

(By Mr. HOGG.)

Q. Let us have your name. A. Lee Sai Ying.

(Testimony of Lee Sai Ying.)

Q. You are the defendant in this case?

A. Yes.

Q. Have you a certificate of residence issued by any Government official to you?

A. I don't know what the certificate of residence is, but I have a certificate in my possession. [28—4]

Q. Would you let me see that certificate?

A. The Immigration Office at Honolulu retained my certificate.

Q. Is this it? A. Yes, that is mine.

Q. Is that the only certificate issued by any immigration or custom officials to you?

A. That is the only one.

Mr. SCOTT.—I move to strike out all the testimony of this witness on the grounds that this defendant is seeking to and did come into the country as an American citizen; that no certificate of residence is required of a Chinese entering the United States,—he is basing his claim upon American citizenship.

(Argument.)

The COURT.—Motion denied.

Cross-examination.

(By Mr. SCOTT.)

Q. How old are you? A. Thirty-two years.

Q. You were born then in 1895?

A. I cannot remember the year and date.

Q. About what month were you born?

A. February 25, Kwong See '25.

(Testimony of Lee Sai Ying.)

Q. Where were you born?

Mr. HOGG.—May it please the Court, I object to this line [29—5] of cross-examination, the defendant was put on the stand for the purpose of finding out if he had a certificate of residence, and he can be cross-examined on that one proposition, may it please the Court, but he cannot be examined on anything else. If he wants to make him his own witness we have no objection.

The COURT.—The Court will give you the right to take him on redirect; you will have your opportunity to question him. Objection overruled.

Q. Where were you born?

A. Smith and Hotel Street corner.

Q. Where? A. Smith and Hotel, Honolulu.

Q. In October,—what year?

A. I cannot remember the year.

Q. In any event you know that you are 32 years old? A. Yes.

Redirect Examination.

(By Mr. HOGG.)

Q. When did you say you were born?

A. February 25th, 1921,—not 1925; it was Kwong See, February 25, 1921.

Q. Is that what he said?

A. In Chinese, Kwong See 21.

The COURT.—He says he was born on the corner of Smith and Maunakea Streets. What month and what year?

A. I don't know the American year. [30—6]

(Testimony of Lee Sai Ying.)

The COURT.—Give us the Chinese year?

A. Kwong See 21.

Q. Kwong See 21,—that is 1895. What month and what day? A. February 25th.

Q. Chinese count? A. Yes.

Q. That would be the 19th of February, 1895.

Mr. HOGG.—Q. What month did you say?

A. Kwong See 21.

Q. What month? A. February 25th.

Q. Can you give me the month, Chinese count?

A. That is Chinese count.

Q. You came into the United States in 1922, didn't you? A. Yes.

Q. And at that time you were asked your age and you stated that you were born March 21st, 1895. Now, which is correct, March 21st or February 25th?

A. It is February 25th, is the correct date.

Q. How do you know you were born here in Honolulu? A. My parents told me so.

The COURT.—Q. Where are your parents?

A. Sun Ching.

Q. How old were you when you left here?

A. According to Chinese count when I was three years of age, when I left here.

Q. Who went with you? [31—7]

A. My parents.

Q. Did you ever hear about the ship you went on? A. "Peking."

Q. Do you remember the date?

A. Some time in October.

(Testimony of Lee Sai Ying.)

Q. What was your father's name?

A. Lee Long.

Q. And your mother's name?

A. Wong, her surname is.

Q. What is the rest of the name?

A. Her name is Wong; that is all I know.

Q. Was your mother living? A. Yes.

Q. You do not know whether it is Wong Shee, Wong Lee, Wong Duck or anything; all you know is that your mother's name is Wong, is that it?

A. It is Wong, or Wong Shee.

Q. What was your father's business when he was here?

A. Well, he sell vegetables and sometimes eggs, and so forth.

Q. Was he a peddler or did he have a place of business? A. He is a peddler.

Q. Well, now, you are talking about what you heard about his business when he was in Honolulu, is that right? A. That is what I heard.

Q. Do you know anybody here that knew your father when he was here? [32—8] A. A few.

Q. You left here when you were three years old, and you came back here when you were twenty-seven, is that right? A. Yes.

Q. How did you happen to come back after 24 years, to the Territory?

A. Because I am a citizen is why I came back.

Q. What prompted you after 24 years,—you were 27 years old when you started back here,—what were the reasons for your coming here, did

(Testimony of Lee Sai Ying.)

you have any discussion with anybody or did anybody send for you, or anything?

A. Because I wanted to come back here, because I am a citizen.

Q. Did your father ever say anything to you about coming back to Hawaii?

A. Why, yes, he said that I am born in the Territory here, if I want to go back to Hawaii I can go back to Hawaii.

Q. When did he tell you that?

A. That was in China.

Q. When? A. I can't remember.

Q. How many times did you discuss Hawaii with your father? A. I can't remember.

Q. Did you ever talk about the Islands with your mother? [33—9]

A. Yes, she told me that I was born in Hawaii.

Q. Now, you tell me some of the things that your father and mother told you about Hawaii, life in Hawaii. Just tell me some of the things.

A. Yes, my parents had a discussion about his business in Honolulu here, saying that he is in the vegetable business and that he peddles eggs, and that it is pretty hard to make a living here, it is not easy to make money, and there is some other discussion now which I forget.

Q. I do not care about discussions; do you remember any incident that they related to you about the time they lived in Hawaii, anything about the number of years they had lived here, something about the life here, or anything like that? Tell us

(Testimony of Lee Sai Ying.)

all you can remember about what they said. You were 27 years old when you left home. By the way, did you live with your parents up to the time you left home? A. Yes.

Q. Were you married? A. Yes.

Q. Where is your wife? A. In China.

Q. And during the time previous to your coming here, I understand you lived at home with your parents, is that right? A. Yes. [34—10]

Q. Have you any brothers or sisters?

A. No, I am the only one in the family.

Q. Now, tell us anything that you can remember about what your father and mother may have told you, or what you may have overheard them say, about the Hawaiian Islands, and life here.

A. I can't remember. I know they spoke to me about it, but I really can't remember it.

Q. Where did you get the money to come out here? A. I got money.

Q. Where did you get it?

A. Well, my parents give it to me.

Q. What work did you do in China?

A. Farming.

Q. What kind of work are you doing here?

A. I do anything.

Q. Have you any steady employment?

A. No, but sometimes I work for the restaurant and sometimes daily work.

Q. When you landed here where did you go?

A. Kwai Yau.

Q. Where is that? A. Kaimuki.

(Testimony of Lee Sai Ying.)

Q. That is L. Kwai Yau, that grocery store up there? A. Yes.

Q. How long did you remain there?

A. I didn't work there, just go there is all. [35—11]

Q. Are you any relation to any of those people there? A. No.

Q. How did you happen to go there?

A. Well, I went up there, so I bring my baggage up there.

Q. You do not need to be afraid to answer my questions. I want to know how it was that after you came to Honolulu and landed, passed the Immigration Station, how you came to go to L. Kwai Yau's store at Kaimuki?

A. Well, I don't know; the driver took me up there.

Q. Did the driver come to the Immigration Station and get you? A. Yes.

Q. Well, when you left China did you know you were to go to L. Kwai Yau's place?

A. No, before I left and when I was on the boat coming here I don't know where I am going, but when I got down to the Immigration Station I think it was one of the witnesses instructed the driver to take me up to L. Kwai Yau's store.

Q. Who were your witnesses? A. Lee Tan.

Q. Who else? A. Jong Tai Fong.

Q. Where are Lee Tan and Jong Tai Fong?

A. I don't know where they are now.

Q. When did you last see them? [36—12]

(Testimony of Lee Sai Ying.)

A. After I landed here.

Q. How long after you landed here was the last time you saw them?

A. The time I was arrested.

Q. When was that?

A. I can't remember the date.

Q. Was it a few days ago you saw these two witnesses? A. About two weeks ago.

Q. That is the last time you saw them?

A. Yes, that is the last time I have seen them.

Mr. HOGG.—Q. When was it that you went to China? Did you say you went to China? How old were you? A. Chinese count, three years.

Q. Do you remember on what date you went to China?

A. According to Chinese count it was sometime in October, Kwong See 23.

The COURT.—That would be 1897.

Recross-examination.

(By Mr. SCOTT.)

Q. What witnesses did you say you had down here at the time you were arrested and examined?

A. Lee Tan; there is only one, by the name of Lee Tan.

Q. Who else?

A. I know of my own knowledge by the name of Lee Tan, that is all down there, but there were two others they could not find, they could not get them. [37—13]

(Testimony of William A. Brazie.)

Q. Did you testify here as to what their names were? A. Lee Tan and Jong Tai Fong.

(Witness excused.)

TESTIMONY OF WILLIAM A. BRAZIE, FOR THE GOVERNMENT.

WILLIAM A. BRAZIE, called as a witness for the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HOGG.)

Q. State your name in full.

A. William A. Brazie.

Q. Your official position?

A. Assistant director of the United States Immigration Service, Honolulu, Hawaii.

Q. For approximately how long have you occupied that position? A. Three years two months.

Q. I ask you to examine that receipt, that certificate. Is that the certificate of residence required by the Chinese Exclusion Act of 1892 as amended in 1893? A. It is not.

Cross-examination.

(By Mr. SCOTT.)

Q. Mr. Brazie, I show you this Certificate of Identity, Number 43097, issued by the Department of Labor of the United States of America to Lee Sai Ying. Do you [38 — 14] recognize that as being a certificate of identity issued to this defendant here?

(Testimony of William A. Brazie.)

A. It is a certificate of identity; I could not state whether it was issued to this defendant or not.

Q. You know the signature of Mr. Halsey, do you? A. Fairly well; yes, sir.

Q. Would you recognize that as his signature?

A. That appears to be the signature of Richard L. Halsey, formerly inspector in charge at Honolulu.

Q. Now, at the time that the defendant, Lee Sai Ying, was arrested here and examined before the Immigration authorities was this certificate taken away from him do you know?

A. I do not know.

Q. Who was the examining officer?

A. Inspector George A. Erbs.

(Recess.)

Q. I show you this certificate of identity issued to Lee Sai Ying, *alias* Lee Hung Chong, and ask you if that is the certificate of identity which was issued,—the form, to Chinese who are admitted to the United States? A. It is.

Q. And you recognize the signature of Richard L. Halsey the immigration official in charge, as being his signature?

A. I think that is Mr. Halsey's signature; it looks like it. [39—15]

Mr. SCOTT.—I offer this certificate of identity in evidence. It is Number 43,097 issued by the Department of Labor, United States of America, to

(Testimony of George A. Erbs.)

Lee Sai Ying, *alias* Lee Hung Chong, dated the 1st day of February, 1923.

The COURT.—It may be admitted, and marked Defendant's Exhibit "1."

(Certificate is received and marked Defendant's Exhibit "1.")

TESTIMONY OF GEORGE A. ERBS, FOR THE GOVERNMENT (RECALLED).

GEORGE A. ERBS, recalled by the Government, testified as follows:

Direct Examination.

(By Mr. HOGG.)

Q. Did you conduct an examination of this defendant during the past month of this year?

A. Yes, sir.

Q. Where?

A. At the Immigration Station, Honolulu.

Q. At that time did you compare the testimony he gave you with the testimony he gave the immigration officers when he came into the United States in 1922? A. Yes, sir.

Q. In speaking of the character of his mother's feet what does the record of 1922, when he first came in here, say with relation to his testimony?

The COURT.—Isn't the record the best evidence of what [40—16] was said. Why is Mr. Erbs in any better position than the Court to determine what these two records say; why should the Court

(Testimony of George A. Erbs.)

be bound by the conclusions of Mr. Erbs as to what was said?

Mr. HOGG.—Q. Have you the official record of this man's entrance here?

The COURT.—Pick out the record asked about, the one about this defendant, and tell us what that record is.

A. This is the record of 1922; also at the present time.

Mr. HOGG.—Q. Now you have identified it. Put it together and submit it to counsel for the defendant for his inspection. Is that an official record from the Department of Immigration?

A. Yes, sir.

Q. Part of the files of your office required by law to be kept? A. Yes.

Q. Relative to the admission of aliens into the United States or persons coming into the United States, produced from the records of your office?

A. Yes, sir.

Q. Is this the whole record in the matter?

A. Yes, I believe it is.

Q. Of the examination in 1927 too?

A. In the examination of 1922 and of 1927.

(Recess.) [41—17]

Q. What is that bunch of papers, Mr. Erbs?

A. That is the complete record of the Immigration file in the City of Honolulu of Lee Sai Ying.

Q. The defendant in this case? A. Yes, sir.

Mr. HOGG.—May it please the Court, we offer

(Testimony of George A. Erbs.)

that record, complete, as it is, as evidence, at this time.

Mr. SCOTT.—If your Honor please, I object upon the grounds, amongst other things, that this record is not in any way, shape or manner an official proceeding; that the record was made through an interpreter, and that in an *ex parte* proceeding the defendant in that case, in this investigation, was not given benefit of counsel; he had no opportunity to examine either the witnesses or the interpreter, or to cross-examine. I do not think that it should be admitted.

The COURT.—Is this your official record?

A. Yes, sir.

Q. All the investigations made there were officially made? A. Yes, sir.

Q. The interpreter used was your regular official interpreter, connected with your department?

A. Yes, sir.

Mr. SCOTT.—I further object to it, your Honor. [42—18]

(Argument.)

The COURT.—Objection overruled.

Mr. SCOTT.—I take an exception. If your Honor please, I object also because there are a couple of letters in that evidence.

The COURT.—All we are interested in is the proceedings at those hearings; whatever else may be there will not be considered.

(Document received and marked Government's Exhibit "A.")

(Testimony of George A. Erbs.)

Q. Have you the department record of Lee Long, the alleged father of this defendant?

A. That departure record is in the Archives Building.

Q. Have you had occasion to examine that departure record? A. Yes.

Q. At the Archives? A. Yes.

Q. The only place where the record is now?

A. That is the only place I know of.

Q. That record is kept there complete?

A. Yes. [44—20]

Q. The record prior to the annexation of the Islands to the United States? A. Yes, sir.

Q. What does that departure record say?

Mr. SCOTT.—I object to that, your Honor.

Q. What does that say relative to the number of children that went away with Lee Long and his wife at this time?

Mr. SCOTT.—I object, your Honor, on the grounds that the record itself is the best evidence.

The COURT.—Objection sustained.

(Whereupon an adjournment was taken until 9 o'clock A. M., Thursday, June 9, 1927.) [45—21]

[Title of Court and Cause.]

The above-entitled matter came duly on for further hearing on Thursday, June 8, 1927, at 9:30 o'clock A. M., all parties being present as before, whereupon the following proceedings were had and testimony taken:

TESTIMONY OF VALENTINE K. RICHARDS, FOR THE GOVERNMENT.

VALENTINE K. RICHARDS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HOGG.)

Q. State your name, please.

A. Valentine K. Richards.

Q. Your official position, if any?

A. Clerk of the Public Archives.

Q. Of the Territory?

A. Of the Territory of Hawaii.

Q. Have you there the outgoing manifest of the City of Peking for October— A. Yes, sir. [46—22]

Q. October, 1897? A. Yes, sir.

Q. I will ask you to look at the manifest and see if there is a departure there of one Lee Long, *alias* Lee Ping Tong. A. Lee Long here.

Q. How does that item read?

A. Lee Long and wife and child.

Mr. HOGG.—Now, may it please the Court, this is a record of the Territory and it is very difficult to have it remain here. I have asked the question, without offering the record as evidence, for that reason, subject to objection if counsel wants to object to it.

Mr. SCOTT.—As a matter of fact, your Honor,

(Testimony of Valentine K. Richards.)

the record is not admissible here, but I have no objection to its being testified to.

Q. There is not any other name, Lee Long or Lee Ping Tong on that manifest?

A. There is a name here Lee Ping, or "Ring," I cannot make it out.

(Cross-examination waived.)

TESTIMONY OF GEORGE A. ERBS, FOR THE GOVERNMENT (RECALLED).

GEORGE A. ERBS, recalled as a witness for the Government, testified as follows:

Direct Examination.

(By Mr. HOGG.)

Q. Mr. Erbs, have you examined the records of your [47—23] office for records of Chinese,—Chinamen who returned to this port claiming they departed on the record of Lee Long, *alias* Lee Ping Tong?

Mr. SCOTT.—May I ask what is the purpose of this examination?

Mr. HOGG.—The purpose of this examination is to show that on this record of departure of the parents,—mother and one child, there have come into this port three or four different Chinese persons claiming to be this particular child, and this defendant is one of them.

A. Yes. The records of the Immigration Service of Honolulu show that four boys came back claiming to be Lee Long's boy, who departed on October

(Testimony of George A. Erbs.)

9th, 1897, with his wife and his child on the City of Peking.

Q. Four have come back claiming to be that boy?

A. Four. Four different records.

Q. And this defendant is one of those four?

A. Yes, sir.

The COURT.—Where are those records?

A. Here.

Mr. SCOTT.—If your Honor please, I object to the admission of these records. There has been no foundation laid upon which they can be offered in evidence.

The COURT.—They have not been offered as yet.

Mr. HOGG.—I did not intend to offer the records in [48—24] evidence. We have the testimony before the Court. The records are there, and it is the policy of the immigration people to keep the records in their own control.

Cross-examination.

(By Mr. SCOTT.)

Q. Mr. Erbs, I would like to show you Certificate of Identity, marked Defendant's Exhibit 1, issued to Lee Sai Ying by the United States—by the Department of Labor of the United States, numbered 43097, and ask you if that is the certificate of identity that you took from the defendant here at the time of his examination before you, on or about May the 18th? A. Yes, sir.

Q. And you recognize this? You identify this

(Testimony of George A. Erbs.)

as being a photograph of Lee Sai Ying, the defendant? A. Yes, sir.

Q. This has been in your possession since that date, has it not?

A. It has been with our records pertaining to him.

Q. Now, Mr. Erbs, this examination that you conducted upon the arrest of the defendant here, Lee Sai Ying, on May the 17th or May the 18th of this year,—whom did you examine?

A. I examined this defendant, Lee Sai Ying, and also a Chinese named Lee Tang or Dan.

Q. Lee Dan? [49—25]

Q. At the time that you examined Lee Dan was the defendant present? A. He was.

Q. He was there before you?

A. Yes, he was in the same room.

Q. Does that appear of record?

A. I believe it does; it should be at the heading of Lee Dan's examination.

Q. He was not represented by counsel, however, was he, the defendant?

A. No, not that I know of.

Mr. SCOTT.—If your Honor please, at this time I should like to make a motion to strike from the record the statment of Lee Dan made in the examination on the 17th and 18th of May, 1927, held before G. A. Erbs, inspector, and which is contained in the Government's record filed in this case, in its Exhibit "A." I make this motion upon the grounds that this evidence is hearsay; that Lee Dan

has not been produced as a witness in this case; that it is nothing more or less than an *ex parte* statement taken at an informal hearing before Mr. Erbs, an inspector of immigration; that it is not binding upon the defendant in this case, and that it is nothing more or less than a statement taken unofficially, *ex parte*. Now, as a matter of fact, this statement is no more admissible, your Honor, [50—26] than any statement or affidavit taken in the preparation of any case in the absence of any testimony by the witness who made the statement in that case. Lee Dan is not a witness here; he has not been called by the Government. The only way in which any such statement can be made is this: That where, as a matter of fact, a witness is called and has before that time made some statement, he may be confronted with that statement to impeach him. I will admit, if your Honor please, that the record—

The COURT.—All the Court admitted was the statement of this witness,—the statement made in 1927.

Mr. SCOTT.—Then your Honor will strike it?

The COURT.—I will ignore it altogether.

Mr. SCOTT.—Your Honor, I ask in case there may be an appeal in this case, that that statement be withdrawn from the record.

The COURT.—That is all right. The record will show the examination of this man in 1922 when he entered and his examination in 1927. They may bring in here a stack of papers as high as the Bible

and it would not make any difference. Take it out of the record and proceed with the case.

Mr. HOGG.—Has the Court already ruled on this thing?

The COURT.—You are directed, Mr. United States Attorney, to forthwith issue a subpoena to Lee Dan [51—27] to appear before this Court. Is the defendant going to call any witnesses?

Mr. SCOTT.—None. Do I take it that Lee Dan will be used as a witness for the Government?

The COURT.—No. I want to have him handy here. [52—28]

The COURT.—Gentlemen, what do you do?

Mr. HOGG.—We rest.

Mr. SCOTT.—The defendant rests.

The COURT.—Are you ready to argue?

Mr. HOGG.—We are, may it please the Court.

Mr. SCOTT.—Yes, your Honor.

(Mr. Hogg makes opening argument for the Government.)

(Mr. Scott makes his argument.) [61—37]

(Mr. Hogg makes concluding argument for the Government.)

The COURT.—This matter will be taken under advisement and a decision rendered at an early date. [63—39]

I HEREBY CERTIFY the foregoing to be a full, true and correct transcript of my shorthand

notes taken in the above-entitled matter, the same consisting of thirty-nine typewritten pages.

R. N. LINN,
Official Reporter.

Honolulu, T. H., April 25, 1928. [64—40]

DEFENDANT'S EXHIBIT No. 1.

No. 43097. ORIGINAL.
Defts. Exhibit 1.
Case #5564.

THE UNITED STATES OF AMERICA.

DEPARTMENT OF LABOR.

Certificate of Identity Under Rules Relating to Chinese Residents.

This is to certify that the Chinese person named and described on the reverse side hereof has been regularly admitted to the United States, as of the status indicated, whereof satisfactory proof has been submitted. This certificate is not transferable and is granted solely for the identification and protection of said Chinese person so long as his status remains unchanged; to insure the attainment of which object an accurate likeness is attached, with his name written partly across, and the official seal of the United States Immigration Officer signing this certificate impressed partly over said photograph.

DESCRIPTION.

Name: LEE SAI YING, *alias* LEE HUNG CHONG.

Age: 27. Height, 5 ft. 5 in.

Occupation: Student; c/o L. Kwai Yow Co., Kaimuki, Honolulu, T. H.

Admitted as HAWAIIAN BORN, ex S/S. "Pres. PIERCE," Nov. 27th, 1922; file No. 4382/1726.

Physical marks and peculiarities: Pock-marks on forehead.

Issued at the port of Honolulu, T. H. this 1st day of February, 1923.

(S.) RICHARD L. HALSEY,
Immigration Official in Charge.

(Photograph)

(Seal)

(S.) LEE SAI YING, *alias* LEE HUNG CHONG. [65]

GOVERNMENT'S EXHIBIT "A."

U. S. DEPARTMENT OF LABOR.

Immigration Service,

Honolulu, T. H.

4382/1726. May 17, 1927.

In re: LEE SAI YING, *alias* KEE HUNG CHONG.

Present: G. A. ERBS—Inspector.
W. K. LEONG—Interpreter.
HELEN W. MULLER—Stenographer.
LEE SAI YING—Witness.

EXAMINING INSPECTOR to WITNESS.—I am an Inspector in the Service of the United States Immigration Service and desire to take a voluntary statement from you concerning your right to be and to remain in the United States. Do you desire to make such statement voluntarily under oath?

A. Yes.

Witness sworn and testifies through Interpreter as follows:

Q. State all of your names?

A. Lee Sai Ying; marriage name, Lee Hung Chong. I have no other name.

Q. How old are you?

A. 32 years old, Chinese count.

Q. When and where were you born?

A. On the 2d month 25th day KS. 21 (March 21, 1895) on Hotel and Smith Streets, Honolulu.

Q. You are advised that any statement you make

to me may be used against you in future criminal proceedings. Do you fully understand that?

A. Yes.

Q. Were you born at the corner of Smith and Hotel Streets, Honolulu?

A. It was around the corner.

Q. On which street did your house face?

A. I do not know on what street my house faced but it was around the corner of Smith and Hotel Streets.

Q. How do you know that you were born around the corner of Smith and Hotel Streets, Honolulu?

A. My father and mother told me that.

Q. What did they tell you and when?

A. They told me that I was born somewhere around the corner of Smith and Hotel Streets, that was at the time I was coming to Honolulu.

Q. When was that? A. That was in 1922.

Q. And that was the first time that your father or mother told you that you were born somewhere around Smith and Hotel Streets, Honolulu?

A. No, that was told me before then but they reminded me at that time.

Q. What is your occupation?

A. I have no occupation at this time.

Q. What was your last occupation?

A. I was a vegetable salesman at Aala Market for Wo Kee Company.

Q. Did you have an interest in that store?

A. No, I just worked for a salary.

Q. How long have you been out of employment?

A. About three months.

Q. What have you been doing during the past three months? A. Nothing.

Q. Where do you live?

A. I live on Kamanuwai Lane in the Kwong Yee Society Building. My room number is 14.

Q. Of what race are you?

A. I am of the Chinese race.

Q. Have you ever visited the home in which you were born? A. No, the place is changed.

Q. How do you know that it is changed?

A. I do not know whether it is changed or Government's Exhibit "A."

Admitted and filed June 8, 1927. [66]

4382/1726. May 17, 1927.

not but it has been such a long time, I think that it has been changed.

Q. Have you ever been shown the house in which you were born? A. No.

Q. Then you would not know the house in which you were born—is that correct?

A. Yes, I would not know it.

Q. How old were you when you first learned that you were born somewhere around Smith and Hotel Streets, Honolulu?

A. When I was about 13 or 14 years old.

Q. That was the first time that anyone ever told you that you were born in the Hawaiian Islands—is that correct? A. Yes.

Q. Who told you at that time?

A. My father and mother.

Q. Where were you living at that time?

A. At Sun Chin Village, China.

Q. Before you were 13 or 14 years old, where did you believe you were born?

A. I was small then, I did not think of it. I did not know where I was born.

Q. When did you last return from China?

A. In November, 1922, on the SS. "President Pierce."

Q. How old were you at that time?

A. 27 years old, Chinese count.

Q. Whom does this photograph represent—referring to photograph of Lee Sai Ying *alias* Lee Hung Chong attached to application and receipt of Certificate of Identity No. 43097 contained in file 4382/1726? A. That is myself.

Q. Is this your certificate of Identity which you gave me just a few moments ago?

A. Yes. (Referring to Certificate of Identity No. 43097 upon which applicant obtained receipt as shown above. Photograph attached is a good likeness of the present applicant.)

Q. Are your parents living?

A. Yes, both of them.

Q. What is the name of your father?

A. Lee Long, marriage name Lee Ping Bo.

Q. Has he any other name? A. No.

Q. How old is he?

A. 66 years old, Chinese count.

Q. Where is he living?

A. At Sun Chin Village, China.

Q. What is he doing there?

A. I do not know.

Q. What was he doing when you were last in China? A. A vegetable gardener.

Q. What was the name of your mother?

A. Wong Shee.

Q. How old is she? A. About 58 years old.

Q. What is her native village?

A. Wong Uck Hang Village, Heung Shan District, China.

Q. What kind of feet has she? A. Bound feet.

Q. What kind of feet did she have when you were last in China? A. Unbound feet.

Q. Do you know the difference between bound feet and unbound feet and natural feet?

A. Yes.

Q. What do you mean by bound feet?

A. Feet all tied up and small.

Q. What do you mean by unbound feet?

A. Feet that had been bound but are now untied and a bit larger than bound feet.

Q. What do you mean by natural feet?

A. The same as your feet and my feet; feet that have never been strapped in.

Q. What kind of feet has your mother?

A. My mother had bound feet when I was last in China.

Q. You are sure that your mother had bound feet when you were last in China?

A. Yes. [67]

4382/1726. 3 May 17, 1927.

Q. Why did you just a moment ago state that she had unbound feet?

A. That was a mistake, she has bound feet.

Q. Has she ever to your knowledge unbound her feet for any length of time? A. No.

Q. And your mother has always to your knowledge had little feet and bound?

A. Yes, she has always had bound feet.

Q. Does your mother walk with a natural gait the same as any woman with natural feet?

A. No, she walks stiffly.

Q. Just about how big are your mother's feet?

A. About five inches in length with shoes on.

Q. Did you testify in this office when you were an applicant for admission in 1922? A. Yes.

Q. When you testified at that time you stated that your mother, Wong Shee, had natural feet—was that statement true?

A. That statement was not correct.

Q. Then the statement you have given at this time regarding your mother's feet as being bound is correct—is that so? A. Yes.

Q. Why did you testify in 1922 when you were an applicant for admission that your mother had natural feet when now you claim she has always had bound feet?

Q. My mother has bound feet, the statement I made in 1922 is incorrect.

Q. Have you always lived with your mother at Sun Chin Village until you came here in 1922?

A. Yes.

Q. Then there was no excuse for you stating that your mother had natural feet when she had bound feet? A. No, she has bound feet.

Q. Have you a brother or sister? A. No.

Q. Did you ever have a brother or sister that died? A. No.

Q. Are your father's parents living? A. No.

Q. What was the name of your paternal grandfather?

A. Lee Chuck Sum, I do not know his other name.

Q. How old was he when he died?

A. I do not know.

Q. Did you ever see him? A. No.

Q. What was the name of your paternal grandmother? A. Sui Shee.

Q. When did she die?

A. A long time ago, I do not know when.

Q. Did you ever see her? A. No.

Q. Has your father a brother or sister?

A. No.

Q. Did he ever have a brother or sister who died?

A. No.

Q. Are your maternal grandparents living?

A. No, they also are dead.

Q. What was the name of your maternal grandmother? A. I do not know.

Q. Did you ever see her? A. No.

Q. What was the name of your maternal grandfather? A. I do not know.

Q. Did you ever see him? A. No.

Q. Has your mother a brother or sister living?

A. No.

Q. Did your mother ever have a brother or sister that died? A. No.

Q. Doesn't it seem rather strange that for three generations there is only one person in the family?

A. No, there was only one in each family of us.

Q. Has your father ever been in the Hawaiian Islands? A. Yes.

Q. When did he first come here?

A. I do not know.

Q. Did you ever hear? A. No.

Q. Was your mother ever in the Hawaiian Islands? A. Yes. [68]

4382/1726. 4 May 17, 1927.

Q. When did she first come here?

A. I do not know.

Q. How many trips have you made to China?

A. One only.

Q. When did you make that trip to China?

A. KS. 23.

Q. What month? A. 10th month.

Q. What day? A. I do not remember the day.

Q. Is that Chinese or English count?

A. I do not know whether it is Chinese or English count. My mother told me it was the 10th month in KS. 23 but she did not say whether it was Chinese or English count.

Q. On what ship did you leave for China?

A. SS. "Peking."

Q. With whom did you leave?

A. With my father and mother.

Q. Did your father ever return to the Hawaiian Islands from that trip? A. No.

Q. Did your mother ever return to the Hawaiian Islands from that trip? A. No.

Q. And you returned here ex SS. "President Pierce" in November 1922—is that correct?

A. Yes.

Q. And how old were you when you went to China with your parents?

A. About three years, Chinese count.

Q. How old was your father when you went to China with him?

A. About 36 years old at that time.

Q. You are sure of that? A. Yes.

Q. What was the occupation of your father in the Hawaiian Islands before he went to China with you and your mother?

A. He was an egg and vegetable peddler.

Q. Did he have a store or did he peddle it from place to place? A. He was a peddler.

Q. And he never had a store in the Hawaiian Islands to your knowledge? A. No.

Q. How do you know that he was an egg and vegetable peddler in the Hawaiian Islands?

A. He told me that.

Q. When did he tell you?

A. Just before I came to Honolulu in 1922.

Q. Did he ever tell you that he followed any other occupation besides that of peddling of eggs and vegetables? A. No.

Q. Did he tell you that peddling eggs and vegetable was the last occupation he followed here?

A. Yes.

Q. Have you any documents showing your birth in the Hawaiian Islands?

A. No. I have nothing except the Certificate of Identity which I gave to you.

Q. Do you know whether you were issued any kind of certificate before you left the Hawaiian Islands in KS. 23? A. No.

Q. Did your father obtain a certificate before he left the Hawaiian Islands in KS. 23?

A. I do not think so.

Q. Did you ever see a certificate issued to your father before he left the Hawaiian Islands in KS. 23? A. No.

Q. Did he ever tell you whether or not he obtained a certificate before he left here in KS. 23?

A. No, he never told whether he received a certificate or not.

Q. Did you ever see a certificate issued to your father before he left the Hawaiian Islands?

A. No.

Q. And he never told you about receiving any?

A. No.

Q. If your father had received a certificate do you think that he would have told you before you arrived here in 1922?

A. Yes, I believe he would have. He never told me about receiving any certificate before going to China.

Q. How do you know that you went to China in KS. 23 10th month on the SS. "Peking"? [69]

4382/1726. 5 May 17, 1927.

A. My father and mother told me that while I was in China.

Q. Did they tell the names of anyone else who went to China at that time? A. No.

Q. Where did you live just before coming here in 1922? A. At Sun Chin Village, China.

Q. What part of the village?

A. Near the tail of the village.

Q. Does your house at Sun Chin Village face a street or lane? A. Faces a lane.

Q. Is that the only house at Sun Chin Village that your father owns? A. Yes.

Q. Did you live in the same house at Sun Chin Village ever since you went there in KS. 23 until you returned here in 1922? A. Yes.

Q. On what side of the lane is that house going in? A. On the left-hand side.

Q. Which house on the left-hand side is yours?

A. First house in the lane near the street.

Q. Who lives in the next house on the same side of the lane? A. Lee Ah Chee.

Q. Where is he now? A. He is dead.

Q. When did he die?

A. He died before I came to Honolulu, about twenty years ago.

Q. How many houses in that lane on the same side of the lane that your house is on?

A. Two houses, including ours.

Q. How many houses on the other side of the lane? A. One house.

Q. Who was living in your house at Sun Chin Village before you came here in 1922?

A. My father, my mother, my wife, Young Shee and my son, Lee Chan Quan.

Q. Has either your wife or your son ever been in the Hawaiian Islands? A. No.

Q. Whom does this photograph represent?

A. Lee Tan. (Referring to photograph of Lee Tan attached to Form 432 contained in File 4380/639.)

Q. Has he any other name? A. No.

Q. How do you know that that is Lee Tan?

A. He was a witness for me when I came to Honolulu in 1922.

Q. Did you ever see him in China? No.

Q. Is he any blood relation to you?

A. No relation.

Q. Did you know that he was going to be a witness for you in 1922? A. Yes.

Q. How did you know that?

A. My father wrote to him and told him to come as a witness for me.

Q. When did your father write to him?

A. At the time I was about to come to Honolulu.

Q. Did your father receive any correspondence from Lee Tan? A. I do not know.

Q. Did you ever hear of your father receiving any correspondence from him?

A. I do not know.

Q. Has Lee Tan a family? A. Yes.

Q. What family has he? A. A wife and son.

Q. What is the name of his wife and the name of his son? A. I do not know their names.

Q. How do you know that he has a wife and son?

A. My father and mother told me that he had a wife and son.

Q. Did you ever visit the home Lee Tan's in China? A. No.

Q. What is his native village?

A. Hang How Hee Village.

Q. How do you know that?

A. My father and mother told me.

Q. Where does Lee Tan live now?

A. I do not know where he is now.

Q. Have you seen him since you returned here in 1922? A. No.

Q. You have never seen Lee Tan since you were admitted here in 1922?

A. No, I [70] have never seen him.

4382/1726. 6 May 17, 1927.

Q. Whom does this photograph represent—referring to photograph of Lee Man Kwai attached to Form 432 contained in file 4380/1745?

A. Lee Man Kwai.

Q. Where is he now?

A. I think he has gone to China.

Q. When did he go to China?

A. I do not know when he went, I just guessed he went to China.

Q. How did you happen to guess he went to China?

A. Because I have not seen him for a long time.

Q. When was the last time you saw him?

A. About three or four months ago.

NOTE: File 4380/1745 shows that Lee Man Kwai returned to China on the SS. "President Lincoln" February 11, 1927, without securing a Return Certificate from this office.

Q. Was he a witness for you when you were an applicant for admission in 1922? A. Yes.

Q. What is his native village in China?

A. Sun Chin Village.

Q. Is he married? A. Yes.

Q. What is the name of his wife?

A. Wong Shee.

Q. How old is she now?

A. Little over 40 years old.

Q. Has Lee Man Kwai any children?

A. Yes, one son and one daughter.

Q. Did you ever see Lee Man Kwai in China?

A. Yes, I saw him in China.

Q. When was the last time you saw him in China? A. About a year before I came here.

Q. Was that the first time you ever saw him?

A. Yes.

Q. Is he any blood relation to you? A. No.

Q. Does he live near your home at Sun Chin Village? A. No.

Q. How far from your home does he live?

A. About one-half hour's walk.

Q. Whom does this photograph represent—referring to photograph of Jong Tai Fong attached to Form 432 contained in file 4380/1862?

A. Jong Tai Fong.

Q. Was he a witness for you when you were an applicant for admission? A. Yes.

Q. Where is he now?

A. I do not know, he is either in the country or some other Island.

Q. When was the last time you saw him?

A. About six months ago.

Q. Where did you see him at that time?

A. On the street.

Q. Did you speak to him at that time? A. No.

Q. When was the last time you spoke to him?

A. That was about six months ago and I asked him where he was going and he said he was just walking around.

Q. Did you ever see him in China? A. Yes.

Q. Where? A. At Sun Chin Village, China.

Q. When was that?

Q. When he went to China a little over a year before I came here.

Q. Was that the first time you had ever seen him?

A. Yes.

Q. Did you ever go to his home in China?

A. Yes.

Q. How many times? A. About two times.

Q. Where is his house in China?

A. At Chung Bin Village.

Q. Did he ever visit your house in China?

A. Yes.

Q. How many times did he visit your house in China? A. About three or four times. [71]

4382/1726. 7 May 17, 1927.

Q. When was that?

A. That was the year he was back in China.

Q. How did he happen to come to your house?

A. He is a friend of my father.

Q. How did you happen to go from your village to his village to visit his house?

A. I just went there to visit him.

Q. Does he know about your birth in the Hawaiian Islands? A. Yes.

Q. How?

A. He is a friend of my father's and at the time of my birth here he visited my father.

Q. How do you know that he visited your father in Honolulu about the time of your birth?

A. My father told me when Jong Tai Fong was last in China and my father also told me just before I came here in 1922.

Q. What did your father tell you about Jong Tai Fong's knowledge of your birth in the Hawaiian Islands?

A. My father told me that Jong Tai Fong was a good friend of his in Honolulu and knew of my birth here?

Q. Are you sure of that? A. Yes.

Q. Why should the records of this office show that Jong Tai Fong was not in the Hawaiian Islands at the time you claim to have been born here?

A. I do not know but my father told me he knew about my birth here.

Q. Why should all of your witnesses you had when you were an applicant for admission here in 1922 that your mother had natural feet and not bound feet as claimed by you at this time?

A. I do not remember what they said but that might be correct?

Q. What do you mean by that?

A. What I said before when I came here in 1922 is correct about my mother's feet.

Q. What did you say about your mother's feet when you were an applicant for admission here in 1922?

A. I do not know what I said at that time.

Q. When Lee Tan, Lee Man Kwai and Jong Tai Fong testified for you in 1922 and stated that your mother Wong Shee had natural feet, were their statements correct?

A. Their statements, I believe, were correct.

Q. Then your statement at this time that your mother Wong Shee has bound feet and not natural feet is incorrect—is that so?

A. No, my mother has bound feet, whatever I said in 1922; that is correct.

Q. What did you state in 1922 about your mother's feet?

A. Some of the testimony I remember and some I do not.

Q. What do you mean by some testimony you remember and some you do not remember?

A. I just remember some and do not remember the other.

Q. Was that testimony given by you in 1922 from your own knowledge? A. Yes.

Q. And if that testimony is true and from your own knowledge, why is it that you are not able to remember it at this time?

A. I remembered until I was admitted here and then I have worked and have forgotten since then.

Q. About how many houses are there in Sun Chin Village?

A. About three or four hunderd houses.

Q. Do you know any one else in Sun Chin Village by the name of Lee Long, similar to that of your father? A. No.

Q. Did you ever hear of anyone by the name of Lee Long at Sun Chin Village, China? A. No.

Q. And you lived in that village from the time you were about how old?

A. From the time I was three years old until I was 27 years old. [72]

4382/1726. 8 May 17, 1927.

Q. Are there any Lee family temples in that village? A. Yes, three.

Q. Is your lane near Chuck Chai Lum?

A. It is about ten lanes from Chuck Chai Lum, it is all Sun Chin Village.

Q. Do you know anyone named Lee Sai Sing at Sun Chin Village, China? A. No.

Q. Did you ever hear of anyone named Lee Sai Sing at Sun Chin village? A. No.

Q. Do you know whose photograph this represents? (Referring to photograph of Lee Sai Sing attached to application and receipt of Certificate of Identity No. 41918 contained in file 4382/1481)?

A. I do not know.

Q. Did you ever see that person represented by the photograph just shown you? A. No.

Q. You are advised that the photograph of the person just shown you claims that his father is Lee Long and is now living in Sun Chin Village, China —what have you to say? A. I do not know.

Q. Is he, this Chinese whose photograph I have just shown you any blood relation to you?

A. No.

Q. And you do not know him or have seen him?

A. No.

Q. He also claims that he departed on the SS. "Peking" in KS. 23 10th month with his father and his mother, which is the same boat and date as you claim—what have you to say?

A. I do not know him, he is no relation of mine.

Q. Do you know this Chinese? (Referring to photograph of Lee Kam Poh attached to application and receipt for Certificate of Identity No. 49832 contained in file 4382/2014.)

A. I do not know who he is.

Q. Have you ever seen this Chinese before?

A. No.

Q. Did you ever see him at Sun Chin Village, China? A. No, I never saw him.

Q. Do you know anyone named Lee Kam Poh?

A. No.

Q. Did you ever hear of anyone by that name?

A. No.

Q. The photograph of the Chinese whom I have just shown you (referring to photograph of Lee Kam Poh contained in file 4382/2014) claims that his father is Lee Long now living at Sun Chin Village and that he departed for China from Honolulu on the SS. "Peking" in KS. 23 10th month with his father, Lee Long and mother—what have you to say? A. I have nothing to say.

Q. Are you any blood relation to this Lee Kam Poh, whose photograph I now show you contained in file 4382/2014? A. No.

Q. And you do not know any other Lee Long at Sun Chin Village besides your father?

A. No, I do not know any other.

Q. Did you ever hear of any other Lee Long at that village? A. No, I never heard.

Q. Have you anything further to state?

A. No.

Q. Have you understood the Interpreter at all times during this hearing? A. Yes.

Q. Have you testified at this time voluntarily and of your own free will and accord? A. Yes.

Signature of witness traced:

SAI YING LEE.

Certified correct transcript.

(S.) HELEN W. MULLER,
Stenographer. [73]

4382/1481; 1882;
4382/1726; 2014.

June 3, 1926.

MEMORANDUM.

Archives

The departure records at the Territorial ~~Board~~ (S.) G. A. E.
~~of Health~~ show that the SS. CITY OF PEKING, departed from this port Oct. 9, 1897, and the following passengers are noted thereon:

"LEE LEONG, WIFE and CHILD"

This departure record has been used in the following files of this office:

4382/1481; 4382/1726; 4382/1882 and 4382/2014.

(S.) GEO. A. ERBS,
Immigrant Inspector. [74]

U. S. DEPARTMENT OF LABOR.
Immigration Service.

OK.
HEM.

Office of Inspector in Charge
Honolulu, Hawaii.
(Date) Jan. 4, 1923.

Inspector in Charge,
U. S. Immigration Service,
Honolulu, T. H.

Sir:

I hereby make application for a CERTIFICATE OF IDENTITY as provided by Rule 19 of the Chinese Regulations.

Name: Lee Sai Ying, *alias* Lee Hung Chong.
Age: 27 yrs. Sex: Male.
Present Address: c/o L. Kwai Yow Co., Kaimuki, Hono., T. H.
Height Without Shoes: 5 feet 5 inches.
Occupation: Student.
Admitted as Hawaiian-born.
Per. S. S. "Pres. Pierce." Date: Nov. 27, 1922.
Date Admitted: Dec. 6, 1922. File No. 4382/1726.
Physical Marks: Pock marks on forehead.
Signature of Applicant: (Signed in Chinese.)
Date of Issuance:
Received C. of I. No. 43097.
This 1st day of March, 1923.
(Photograph.)
Signature: (Signed in Chinese.) [75]

U. S. DEPARTMENT OF LABOR.

Immigration Service.

Port of Honolulu, T. H.

File No. 4382/1726.

BSI. #1.

RECORD OF BOARD OF SPECIAL INQUIRY.

In the Matter of the Application of LEE SAI YING, 2–2, A–1 Hawaiian Born, Ex S/S. "Pres. Pierce," 11/27/22, for Admission to the UNITED STATES.

Convened—December 2, 1922.

Chairman—JACKSON L. MILLIGAN.

Member—LOUIS CEASAR.

Member—WM. K. ANAHU.

Interpreter—HEE KWONG.

Typist—JLM.

Held for Special Inquiry by Inspector HALSEY.

APPLICANT, sworn by Chairman, testifies:

Q. Have you secured an attorney to represent you in the hearing that is about to commence?

A. No.

Q. Do you expect to present witnesses to establish your right to admission to the United States?

A. Yes.

Q. During the course of this hearing it may be necessary for some officer of this Service to take testimony outside of this office, or go to some other Governmental office or place and search records. Are you willing that this should be done and have the testimony taken in this manner, and also have

the report of the search of the records considered by this Board of Special Inquiry? A. Yes.

Q. Do you desire a friend or relative present at this hearing? A. No.

Q. What dialect do you speak?

A. Heung San.

Q. Can you understand the Interpreter?

A. Yes.

Q. What are your names?

A. Lee Sai Ying, *alias* Lee Hung Chong; age, 27.

Q. What is the date of your birth?

A. KS. 21–2–25. (March 21, 1895.)

Q. What is your occupation? A. Farmer.

Q. How many years did you attend School?

A. Two years.

Q. How old were you when you quit? A. 17.

Q. Been farming ever since?

A. Yes, raising vegetables and sweet potatoes.

Q. Are you married?

A. Yes, to Yong Shee, age 24.

Q. From what village is she?

A. Sun Mun Tung.

Q. When were you married?

A. When I was 21.

Q. How many children have you?

A. One son Lee Chan Kwan, age 6.

Q. What is your village in China?

A. Sun Chin.

Q. Are your parents living?

A. Yes; father Lee Long, *alias* Lee Ping Pong, age 61, and mother Wong Shee, 51, natural feet.

Q. What is your father's occupation?

A. Farmer.

Q. Are his parents living?

A. No; I never saw them.

Q. What were their names?

A. Lee Check Sum and Siu Shee.

Q. How many brothers and sisters has your father?

A. None; never had any. [76]

APPLICANT (continued).

Q. From what village is your mother?

A. Wong Ook Pang.

Q. Are her parents living? A. No.

Q. How many brothers and sisters has your mother? A. None.

Q. How many brothers and sisters have you?

A. None.

Q. Ever have any that died? A. No.

Q. Where were you born?

A. Smith Street, near Hotel, Honolulu.

Q. How do you know that?

A. My mother told me.

Q. Anybody else ever tell you?

A. Also my father.

Q. When did you go to China?

A. 12th month, KS. 23, on the "Peking."

Q. Who took you to China? A. My parents.

Q. Did your father ever return here? A. No.

Q. What did he do in Hawaii?

A. Peddler eggs and fruits and general laborer.

Q. How large a village is Sun China?

A. 300 or 400 houses.

Q. Is that village known by any other name?

A. No.

Q. Did you ever hear of a place called Hee Hung Wan? A. It is Sun Chin Hee Hung Wan.

Q. Does any part of the village have any other name?

A. Chook Chai Lum is a small part of Hee Hung Wan.

Q. In what part of the village is your house?

A. Near the tail.

Q. Is it near the sea or near the mountains?

A. Near the hill.

Q. Does it face a street or lane? A. Lane.

Q. Is there a courtyard in front of your house?

A. No.

Q. How many houses does your father own?

A. One house.

Q. Your parents, wife and son all live together in that house? A. Yes.

Q. Who is there in Hawaii whom you know and can identify?

A. Lee Man Kwai; Chun Dai Fong; Lee Dan, but I don't remember Lee Dan.

Q. Anyone else here that you can identify?

A. Only those two.

Q. When did you last see Lee Man Kwai?

A. 5 or 6 years ago.

Q. How old a man is he?

A. About 48 or 49.

Q. Any relation to you?

A. Distant relative.

Q. What family has he in China?

A. Wife Wong Shee; 1 son Lee Ah Yau, 13 or 14; 1 daughter Lee Yee Mui, 11 or 12.

Q. Did he have any children born as a result of his last trip? A. No.

Q. How far is his house from yours?

A. About ½ li.

Q. How did you happen to meet him?

A. I called at his house.

Q. How did you happen to call there?

A. Because we know him and heard he returned to China.

Q. Whom do you mean by "we"?

A. The former time my father took me to his house but the last time I went alone.

Q. Did you visit his house more than once while he was in China last? A. Twice.

Q. Did he call at your house?

A. Not the last time.

Q. When did you last see Chung Dai Fong?

A. He came back to Hawaii this year.

Q. What is his village? A. Chung Bin.

Q. How old a man is he? A. About 48 or 49.

Q. How did you happen to meet him?

A. He is a friend of my father and came to my house, and I went to his house.

Q. What family has he?

A. Wife only, don't know her name, 17 or 18.

Q. Have you ever seen Lee Dan in China?

A. No.

APPLICANT (continued).

Q. How many different families are represented in Sun Chin village? A. Lee and Ho.

Q. How many family temples? A. 3.

Q. How many idol temples? A. 3.

Q. How many stores in the village?

A. 3 or 4 small stores.

Q. What is the nearest market?

A. Sar Kai Hee, but it is more than a tong away.

Q. Are you sure there is no one else here whom you know?

A. Many I know them if I see them, but can't remember their names; I know Lee Sau came back a short time ago. I also remember Lee Leong Bew.

Q. Any further statement to make? A. No.

(Signed in Chinese.)

Witness sworn, testifies: CR. 6962, verified 6/1/21.

Q. Name and age?

A. Jong Tai Fong, *alias* Jong Dat Lim, 50.

Q. Occupation? A. Rice planter.

Q. Where were you born?

A. Chung Bin village—China.

Q. When did you first come to Hawaii?

A. KS. 24.

Q. Been back?

A. Yes, once last year and returned this year.

Q. For whom are you a witness to-day?

A. Lee Sai Ying.

Q. How old? A. 26 or 27.

Q. Where was he born?

A. Hawaii—Smith Street near where Sun Yuen Wo is now.

Q. How do you know that?

A. I went to his father's house in China and asked his father something about Hawaii and saw the boy there and the father told me he took the boy to China a short time ago.

Q. That was before you came to Hawaii?

A. Yes.

Q. What village is the applicant from?

A. Sun Chin.

Q. His parents living? A. Yes.

Q. Father's name?

A. Lee Long, *alias* Lee Ping Bo.

Q. Name of the mother?

A. Wong She, natural feet.

Q. How did you happen to go from your village to another village and meet this Lee Long and find out about his family?

A. I heard he was from Hawaii and I wanted to come here so I went there to ask him about Hawaii.

Q. How many children did you find there?

A. One son.

Q. How old was this boy at that time?

A. About 3 or 4 years old.

Q. You ever see him since.

A. I saw him last year when I went back to China.

Q. What was he doing?

A. He was planting rice with his father.

Q. Is he married? A. Yes.

Q. Name of his wife? A. Young She.

Q. How many children have they?

A. One son only.

Q. How many times did you visit the house on your last trip?

A. Many times—about 10 times.

Q. During all the time the applicant and his father were planting rice were they? A. Yes.

Q. The applicant gives an altogether different occupation than that?

A. He was planting rice with his father in the village.

Q. Can you identify him? A. Yes.

No. 4382/1726. 12/2/22. [78]

(Identification is mutual.)

Q. Has this applicant ever visited your house?

A. Yes.

Q. Who is living in your house?

A. My wife—only my wife—

Q. How large a village is Sun Chin?

A. About 400 or 500 houses.

Q. What part of the village is the applicant's house?

A. Near the center part of the village—interior part—not outside.

Q. Is his house near the sea or near the mountains?

A. Not near the sea nor the mountains.

Q. Is that village known by any other name?

A. Sun Chin—Heung Wan—

Q. The applicant's parents, himself and family all live in one house or do they have more than one house? A. All live in one house.

Q. Any further statement to make? A. No.

(Signed in Chinese.)

Witness sworn, testifies: CR. 865, verified 10/20/11—1/3/03.

Q. Name and age?

A. Lee Tan, *alias* Lee Pui Nam, 56.

Q. Occupation? A. Landlord.

Q. Where were you born?

A. Hank How Hee—Lung Doo—

Q. When did you first come to Hawaii?

A. KS. 12 (1886).

Q. How many trips have you made?

A. Once.

Q. Only once? A. Yes.

Q. When was that? A. 1903.

Q. Family in Hawaii?

A. No, in China.

Q. Name of your wife? A. Chang She.

Q. How many children have you?

A. One son only—Lee Hung Jow, 17.

Q. For whom are you a witness to-day?

A. Lee Sai Ying.

Q. How old is he? A. About 26 or 27.

Q. Where was he born?

A. Corner of Smith and Hotel Streets.

Q. How do you know that?

A. I was a bookkeeper in the corner opposite the house where he lived before and saw him.

Q. His parents living? A. Yes.

Q. Father's name? A. Lee Long.

Q. Mother's name? A. Wong She—natural feet—

Q. When did you first become acquainted with Lee Long?

A. About KS. 16 or 17 (1890) or (1891).

Q. Did he have a wife here at that time when you first met him? A. Yes.

Q. What did Lee Long do in Hawaii?

A. He was an egg peddler.

Q. How many children did they have born here?

A. One to my knowledge.

Q. When did the applicant go to China?

A. About KS. 21 or 22 I don't quite remember.

Q. Who went with him?

A. His father and mother.

Q. His father ever return here? A. No.

Q. Have you ever seen the applicant since he went to China? A. No.

Q. All you know is that Lee Long and his wife had a son by this name born in Hawaii? A. Yes.

Q. Any further statement to make? A. No.

(S.) LAN DUN.

4382/1726 12/6/22. [79]

Witness sworn, testifies: Cr. 7559, verified 12/22/08—9/19/01—5/9/21.

Q. Name and age?

A. Lee Man Kwai, *alias* Lee Yin Hoo, 49.

Q. Occupation? A. Vegetable planter.

Q. Where were you born? A. Sun Chin.

Q. When did you first come to Hawaii?

A. KS. 21 (1895).

Q. How many trips have you made?

A. Four trips.

Q. Name of your wife? A. Wong She.

Q. How many children have you?

A. One son and one daughter.

Q. Names and ages?

A. Lee Yau, 14 or 15, son; Yee Mui, 11.

Q. For whom are you a witness to-day?

A. Lee Sai Ying.

Q. How old is he? A. About 26 or 27.

Q. What right has he to be admitted here?

A. He was born in this island.

Q. Whereabouts on this island?

A. Smith near Hotel.

Q. How do you know that?

A. He was born little after a year after I came here.

Q. What month did you arrive in Hawaii?

A. When I arrived here I saw him here he is from my village.

Q. I say what month did you arrive here on your first trip to China? A. I don't remember.

Q. You sure it was KS. 21? A. Yes.

Q. This applicant testifies he was born in the 2d month of KS. 21 now how could he have been born a year after you arrived?

A. I don't quite remember.

Q. You don't remember whether he was born before or after you came to Hawaii?

A. I was admitted here on the first month.

Q. And he was born a year later was he?

A. I do not know where he lived when I first came here—I went to his house 4 or 5 months later.

Q. Did you see the applicant at that time or was he born later? A. He was born then.

Q. Name of the father? A. Lee Long.

Q. You know his other name?

A. Lee Ping Bo.

Q. What did he do in Hawaii? A. Peddler.

Q. Name of the mother?

A. Wong She—natural feet—

Q. How many children did they have born here?

A. Only the applicant?

Q. When did he go to China?

A. I don't quite remember.

Q. How old was he?

A. He was 2 or 3 years older.

Q. Who went with him? A. His father.

Q. What became of the mother?

A. The mother also went.

Q. The father ever come back to Hawaii?

A. No.

Q. Have you ever seen this family since they went to China?

A. Yes, he went to my place very often.

Q. What is their village in China?

A. Sun Chin.

Q. Their house near yours?

A. About ½ lee.

Q. Have you seen this family on all of your four trips? A. Yes.

Q. They any relation to you?

A. No relation—same family name.

Q. What was the applicant doing on your last trip to China? A. Planting rice.

Q. What was the father doing?

A. Also planting rice.

Q. Was the applicant married on your last trip?

A. Yes.

Q. Name of his wife? A. Young She.

Q. How many children did they have?

A. One son.

Q. Is that village known by any other name?

A. Sometimes known as Chuck Chai Lum Sun Chin and Heung Wan.

4382/1726 12-6-22. [80]

Q. In what division of the village is the applicant's house? A. Sun Chin.

Q. Is his house near the hills or near the sea?

A. Near the hill.

Q. The part known as Chuck Chai Lum is near the sea?

A. Chuck Chai Lum is the same as the other part of the village.

Q. How many family temples are there in the village?

A. 3 family temples—3 idol temples.

Q. How many stores?

A. Two main stores and one small little store when I was in China.

Q. Can you identify the applicant? A. Yes.

(Identification is mutual.)

Q. You swear the person you just saw is the son of Lee Long and that you know of your own knowledge that he was born in Hawaii? A. Yes.

Q. Any further statement to make? A. No.

(Signed in Chinese.)

Applicant recalled, testifies: (Notified he is still under oath to tell the truth).

Q. How old were you when you quit school?

A. When I was 17.

Q. What have you been doing since then?

A. Planting rice.

Q. All the time? A. Yes.

Q. What did you tell us the other day that you had been planting vegetables and sweet potatoes for?

A. Not only planted rice—I also planted any kind of vegetables—sweet potatoes and melons.

Q. How many different occasions do you remember of seeing Lee Man Kwai in the village?

A. Three or four—four or five.

4382/1726. 12–6–22. [81]

NOTE: The records at the Territorial Archives show that Lee Long, wife and child departed per SS. "City of Peking," Oct. 9, 1897.

MOTION.

JACKSON L. MILLIGAN.—From the departure record, identifications and testimony offered at this time I am of the opinion the applicant was born in Hawaii and move that he be admitted as Hawaiian Born. The preponderance of evidence is in favor of the applicant.

WILLIAM ANAHU.—I second the motion.

LOUIS CAESAR.—I concur.

Certified to be correct.

(S.) J. L. MILLIGAN,
Typist.

4382/1726. 12–6–22.

7-21-25.

See departure record in case 4382/1481 and 4382/1882.

(S.) G. A. E. [82]

[Title of Court and Cause.]

(Photograph)
(Seal)

PETITION FOR APPEAL.

To the Honorable RICHARD L. HALSEY, Inspector in Charge, United States Immigration Station, Port of Honolulu, City and County of Honolulu, Territory of Hawaii:

Your petitioner begs leave to make and file this application for and in behalf of Lee Sai Ying, a native-born citizen of the Territory of Hawaii and of the United States, now residing in China, for permission to return to the land of his birth to reside therein and begs further to submit as follows:

That Lee Sai Ying was born at Honolulu, Territory of Hawaii, some 27 years ago, the son of Lee Long and Wong Shee, father and mother respectively.

That Lee Long resided at one time on Smith Street near Hotel Street, in said Honolulu, and was a peddler by occupation; that at this home on Smith Street Lee Sai Ying was born.

That in the year 1897 about the month of October Lee Long took his wife and child and returned to

China, departing from the Port of Honolulu, on board the SS. "Peking." [83]

That Lee Sai Ying had since remained in China in the Village of Sun-chin, Lung-doo, Heungshan, and has now attained manhood, he being 27 years of age at this time; that the photograph attached to the margin hereof is a good likeness of him at the present.

That your petitioner being acquainted with the facts of the case has been requested to file this petition in his behalf.

That your petitioner further submits that he is 56 years of age and had come to the Hawaiian Islands from Lung-doo, China, some 36 years ago; that he is now engaged in the real estate business, residing in said City and County of Honolulu, Territory of Hawaii; that he knew the person named Lee Long, who with his wife resided on Smith Street, in said Honolulu; that he is also acquainted with the fact that said Lee Long and his wife, Wong Shee, had but one child, a son named Lee Sai Ying.

Your petitioner was at Honolulu, at the time of the boy's birth and knew of it from his own knowledge; that Lee Long being a peddler by trade was well known to your petitioner, who for that reason quite frequently called at the Lee Long household, and your petitioner saw the boy on these occasions; a year or so later Lee Long took his wife and child and returned to China, where the boy*s* has remained ever since; that your petitioner has not seen Lee Sai Ying in the many years that he has resided in

China, but believes that the photograph attached hereto is his photograph at this time. [84]

Your petitioner further submits the affidavit of another witness who is familiar with the facts of this matter and who vouches for the identity of Lee Sai Ying.

WHEREFORE your petitioner prays that said Lee Sai Ying be granted permission to return to the land of his birth and upon his arrival at the Port of Honolulu, to admit him under the status hereby claimed in his behalf.

Dated at Honolulu, T. H., this 12th day of July, A. D. 1922.

(S.) LEE DAN.

Territory of Hawaii,
City and County of Honolulu,—ss.

Lee Dan, being first duly sworn, on his oath deposes and says: That he is the petitioner who makes this application for and in behalf of Lee Sai Ying; that he has read said petition and knows the contents thereof and that the matters therein stated are true.

(S.) LEE DAN.

Subscribed and sworn to before me this 12th day of July, A. D. 1922.

[Seal] (S.) ANTHONY Y. SETO,
Notary Public, First Judicial Circuit, Territory of Hawaii. [85]

AFFIDAVIT OF JUNG DAI FONG.

Territory of Hawaii,
City and County of Honolulu,—ss.

Jung Dai Fong, being duly sworn, on his oath deposes and says: That he is a resident of Honolulu, City and County of Honolulu, Territory of Hawaii; that he is 50 years of age and had come to the Hawaiian Islands from China, in 1898, from the Village Chung-bin, Lung-doo, Heungshan; that he knew the family of Lee Long of the Village of Sun-chin, consisting of his wife, Wong Shee, and a son Lee Sai Ying; that this acquaintance began in China in the year prior to his departure for the Hawaiian Islands; that it was affiant's intention to come to the Hawaiian Islands at the time so that when he heard of Lee Long's arrival and return from the very country to which he was emigrating, he made frequent visits to Lee Long making inquiries of the condition and opportunities in the Hawaiian Islands; that during these visits he also saw Wong Shee and their son, Lee Sai Ying; that later affiant came to the Hawaiian Islands and did not see the old village again until 1921, when affiant returned to his old home in China; that affiant again saw the family of Lee Long at Sun-chin and he identifies the photograph attached to the petition as that of Lee Sai Ying, whom he saw in China on this last occasion and knew as the son of Lee Long.

(Signed in Chinese.)
JUNG DAI FONG.
Signing in Chinese.
(S.) A. Y. S.

Subscribed and sworn to before me this 12th day of July, A. D. 1922.

(S.) ANTHONY Y SETO,
Notary Public, First Judicial Circuit, Territory of Hawaii. [86]

[Endorsed]: In the United States District Court for the Territory of Hawaii. Cr. No. 5564. The United States of America, Plaintiff, vs. Lee Sai Ying, *alias* Lee Hung Chong, Defendant. Assignment of Errors. Filed September 30, 1927, at 11 o'clock and 30 minutes A. M. Wm. L. Rosa, Clerk. By (S.) Wm. F. Thompson, Jr., Deputy Clerk. [90]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now defendant above named and files the following assignment of errors on which he will rely in the prosecution of his appeal in the above-entitled cause from the judgment entered herein on the 27th day of September, 1927, in the United States District Court in and for the District and Territory of Hawaii:

1. That the said United States District Court erred in holding and finding that defendant was unlawfully in the United States.

2. That the said United States District Court erred in holding and finding that defendant was not a citizen of the United States.

3. That the said United States District Court erred in holding and finding that defendant was a citizen or subject of the Republic of China.

4. That the said United States District Court erred in holding and finding that defendant was a laborer within the meaning of the Chinese Exclusion Act, found within the United States without the Certificate of Residence required by law. [91]

5. That the said United States District Court erred in ordering and directing the deportation of defendant from the United States to the Republic of China.

6. That the said United States District Court erred in holding and finding that the defendant had not sustained the required burden of proof to establish his lawful right to be and remain in the United States.

7. That the said United States District Court erred in holding and finding that the plaintiff had made out a case entitling it to an order and judgment of deportation against defendant.

8. That the decision and determination of the said United States District Court is contrary to law for the following reasons:

(a) That in the course of the hearing in the above-entitled matter defendant produced and introduced in evidence his Certificate of Identity issued to him by the Immigration Inspector in Charge at the Port of Honolulu following his arrival and admission here, after a hearnig before a Board of Special Inquiry, as a Hawaiian-born citizen of the United States; and plaintiff having in no way im-

peached or otherwise discredited said certificate, or the evidence taken on the hearing before said Board of Special Inquiry when defendant was admitted as aforesaid, defendant was entitled to the dismissal of the complaint and his discharge.

(b) That plaintiff failed to establish that defendant is not entitled to be and remain in the United States.

(c) That plaintiff failed to overcome the *prima facie* case made out by defendant by the production and introduction in evidence of his Certificate of Identity, and the Court [92] therefore erred in denying defendant's motions for discharge and dismissal of the complaint and in ordering and directing the deportation of defendant to the Republic of China.

(d) That the Court erred in not holding and finding there was a failure of proof on the part of plaintiff.

(3) That defendant being charged with having gained his admission into the United States by fraudulent means and representations, the Court erred in not holding and finding that the burden of proof as to such unlawful entry was upon plaintiff, the defendant having produced and introduced in evidence his Certificate of Identity issued to him following his admission at the Port of Honolulu as a Hawaiian-born citizen of the United States.

WHEREFORE, the appellant prays that said judgment and order of deportation be reversed and that said District Court for the District of Hawaii

be ordered to enter a judgment dismissing said complaint and discharging appellant.

(S.) L. P. SCOTT,
Attorney for Appellant.

Received copy of above assignment of errors.
(S.) CHARLES H. HOGG,
Assistant United States Attorney, District of Hawaii. [93]

[Endorsed]: In the United States District Court for the Territory of Hawaii. Cr. No. 5564. The United States of America, Plaintiff, vs. Lee Sai Ying, *alias* Lee Hung Chong, Defendant. Findings, Judgment and Order of Deportation. Filed September 27, 1927, at 3 o'clock and 07 minutes P. M. Wm. L. Rosa, Clerk. By (S.) Wm. F. Thompson, Jr., Deputy Clerk. [103]

In the United States District Court for the Terri- of Hawaii.

Cr. No. 5564.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEE SAI YING, *alias* LEE HUNG CHONG,
Defendant.

FINDINGS, JUDGMENT AND ORDER OF DEPORTATION.

This cause came on regularly for hearing upon the sworn complaint of George A. Erbs, Immigra-

tion Inspector of the United States of America for the Territory and District of Hawaii, charging that the defendant is a person of Chinese descent, and a Chinese laborer within the United States and within the jurisdiction of the United States District Court for the Territory of Hawaii without a Certificate of Residence required by the Act of Congress entitled "An Act to Prohibit the Coming of Chinese Persons to the United States," approved May 5, 1892, and amended November 3, 1893; that on or about the 6th day of December, 1922, he unlawfully obtained admission to the United States by falsely and fraudulently representing himself to be a citizen of the United States; and that he is not entitled to be or remain in the United States.

On the 8th day of June, 1927, the said Lee Sai Ying, *alias* Lee Hung Chong, appearing in person and with his attorney, Leslie P. Scott, Esquire, and Charles H. Hogg, Assistant United States Attorney for the District of Hawaii, appearing for the United States, this cause came on regularly for hearing and the same [104] having been duly heard and submitted and due consideration having been thereon had, I do find as follows:

That said Lee Sai Ying, *alias* Lee Hung Chong, is a Chinese person and a person of Chinese descent and was born in China and is a subject of the Chinese government; that he is a Chinese laborer; that he was found within the limits of the United States, to wit, in the City and County of Honolulu, Territory of Hawaii, on or about the 18th day of May, 1927, without a Certificate of Residence required by

the Act of Congress entitled "An Act to Prohibit the Coming of Chinese Persons to the United States," approved May 5, 1892, as amended November 3, 1893; and that the said Lee Sai Ying, *alias* Lee Hung Chong, did not establish by affirmative proof to the satisfaction of this Court his lawful right to remain in the United States.

NOW, THEREFORE, in consideration of the premises aforesaid, it is ORDERED, ADJUDGED AND DECREED that the defendant, the said Lee Sai Ying, *alias* Lee Hung Chong, be removed and deported from the United States to the country whence he came, to wit, Republic of China; and

IT IS FURTHER ORDERED that such deportation of the said Lee Sai Ying, *alias* Lee Hung Chong, be made from the Port of Honolulu, in the Territory and District of Hawaii, and that he is hereby committed to the custody of the United States marshal for the District of Hawaii to carry this order into effect.

Dated: Honolulu, T. H., September 27, 1927.

WILLIAM T. RAWLINS.

WILLIAM T. RAWLINS,

Judge, United States District Court, Territory of Hawaii. [105]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Wm. L. Rosa, Clerk of the United States District Court for the Territory of Hawaii, do hereby

certify the foregoing pages, numbered from 1 to 109, inclusive, to be a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and I further certify that I am attaching hereto the original citation five orders for the enlargement of time for docketing case and that the cost of the foregoing transcript of record is $43.50, and that said amount has been paid to me by the appellants.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this 4th day of May, A. D. 1928.

[Seal] WM. L. ROSA,
Clerk, United States District Court, Territory of Hawaii. [109]

[Endorsed]: No. 5494. United States Circuit Court of Appeals for the Ninth Circuit. Lee Sai Ying, *alias* Lee Hung Chong, Appellant, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Hawaii.

Filed May 18, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5494.

LEE SAI YING, *alias* LEE HUNG CHONG,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED.

To the Clerk of the Above-entitled Court:

In preparing the printed transcript of the record upon the appeal in the above-entitled cause please print in said transcript all the parts of the record, except the following, which may be omitted:

PARTS OF THE RECORD TO BE OMITTED FROM THE PRINTED TRANSCRIPT.

	Title of Paper, etc.	Page in Original Record.
1.	Clerk's Statement	4– 5.
2.	Enlargements of Time for Docketing Case	6– 13, both inclusive.
3.	Minute Orders Continuing Time of Trial	20, 21.
4.	The following colloquy between Court and counsel:	
	(a) Commencing on page 42, on the fourth line from the bottom with the words "on the" to and including page 44, line 5, ending with the word "matter";	

Title of Paper, etc.	Page in Original Record.
(b) Commencing on page 52, line 6, with the words "This is" to and including page 61, line 15, ending with the word "fraudulently."	
(c) All of page 62, and the first twenty-two lines of page 63, ending with the word "matter."	
5. Petition for Appeal	87– 89 inclusive.
6. Order Allowing Appeal	94– 96 inclusive.
7. Citation on Appeal	97– 99 inclusive.
8. Cost Bond	100–102 inclusive.
9. Praecipe for Transcript of Record..	106–108 inclusive.

Dated: San Francisco, California, August 23, 1928.

LESLIE P. SCOTT,
W. H. EBERLY,
Attorneys for Appellant.

IT IS HEREBY STIPULATED that the appeal may be heard upon the record printed in accordance with the foregoing designation.

Dated: San Francisco, California, August 24, 1928.

GEO. J. HATFIELD,
U. S. Atty.
GEO. M. NAUS,
Asst. United States Attorney.

[Endorsed]: Filed Aug. 24, 1928. Paul P. O'Brien, Clerk.

No. 5494

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

LEE SAI YING, alias LEE HUNG CHONG,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court for the Territory of Hawaii.

APPELLANT'S BRIEF

LESLIE P. SCOTT and
WILMER H. EBERLY,
Attorneys for Appellant.

Filed this.....day of....., A. D. 1928.

By..... .....Deputy Clerk.

HONOLULU STAR-BULLETIN, LTD.

No. 5494

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

LEE SAI YING, alias LEE HUNG CHONG,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court for the Territory of Hawaii.

APPELLANT'S BRIEF

STATEMENT OF THE FACTS

This case is similar to the *Ching Hong Yuk Case* decided by this Court and reported in 23 (2nd) Fed. 174.

Defendant was arrested under the Chinese Exclusion Act, charged with having gained his admission into the United States by false and fraudulent claim of American citizenship. The case was tried before the District Judge, District of Hawaii in the first instance and resulted in an order of deportation. The judge, as in the *Ching Hong Yuk Case*, made no findings of fact on the essential elements involved in the charge. Defendant appealed.

The defendant left Hawaii when he was three years old

with his parents on the S. S. City of Peking, sailing from Honolulu October 9th, 1897. (Record p. 53.) He returned on November 27, 1922, and after a hearing before a Board of Special Inquiry, he was admitted as an Hawaiian-born citizen of the United States, and a Certificate of Identity (Record p. 32) issued to him.

Without anything being disclosed as the reason, six years later, on or about May 17th, 1927, he was arrested by Immigration Inspector Erbs, and taken to the Immigration Station where he was confined and questioned along the line of his examination before the Board in 1922. (Record pp. 22 and 34.)

Another Chinese named Lee Dan who had been a witness for the defendant on his original hearing, was also taken to the station and examined but although available the Government did not call him as a witness. (Record pp. 29 and 31.)

Defendant introduced in evidence his Certificate of Identity. (Record p. 22.) He was also called as a *witness for the government,* and testified at some length under examination by both court and counsel as to his Hawaiian birth, family history, etc. (Record p. 11.) His landing record was introduced in evidence and also the record of his examination in 1928. (Record p. 24.) The Government also called a clerk from the Territorial Archives to read into the record the fact that on the outgoing manifest of the S. S. City of Peking, sailing October, 1897, the name of "Lee Long, wife and child," appeared. (Record p. 26.) We will refer to that at more length in the argument.

ERRORS RELIED ON

The Assignment of Errors are numbered 1 to 8, but we believe the error assigned as No. 6 sufficiently describes the issue presented here:

"That the United States District Court erred in holding and finding that the defendant had not sustained the required burden of proof to establish his lawful right to be and remain in the United States."

ARGUMENT.

If there is anything to distinguish this case from the *Ching Hong Yuk Case,* a conscientious study of the record has failed to reveal it. Exactly what was said in the brief in that case is applicable here.

The burden of proof, which Section 3 of the Exclusion Act places on the defendant, was sustained by the introduction (1) of his 1922 landing record (2) his certificate of identity (3) his unforeseen examination following his unlawful imprisonment in 1927, and (4) his testimony on the witness stand. In all these examinations there is not a material discrepancy. It is true that he is quoted in 1922 as saying his mother's feet were not bound while in 1927 he said they were bound, but this was due no doubt to faulty interpretation or stenographic error. An examination of the record shows how that question was asked—one of a routine group, the answers to which were bunched together. (Record p. 56.) Errors of that sort frequently happen.

The fact is, that after six years the defendant was able to submit to a grilling examination without forewarning or opportunity for preparation and was taken over the same ground as in 1922 and emerged without a discrepancy, except the one noted above and attributable to faulty interpretation or stenographic error. And he was also, on the witness stand, able to withstand the questioning of court and counsel for the government without deviating in the slightest from his original testimony. Comment cannot

add to the impression these significant facts must make on the mind of any candid person.

In the matter of the manifest of the outward bound S. S. City of Peking, mentioned above, a witness was called and adduced the fact that the manifest indicated the departure of Lee Long, his wife and child (Record p. 26) on that voyage, which corroborated defendant's testimony that he departed with his parents on that trip of the steamer. (Record p. 57.) His father's name was Lee Long. (Record p. 56.)

Thereafter Mr. Erbs took the stand and testified as follows:

> Q. Mr. Erbs, have you examined the records of your office for records of Chinese, Chinese who returned to this port claiming they departed on the record of Lee Long alias Lee Ping Tong?
>
> A. Yes. The records of the Immigration Service of Honolulu show that four boys came back claiming to be Lee Long's boy, who departed on October 9th, 1897 with his wife and child on the City of Peking.
>
> Q. Four have come back claiming to be that boy?
>
> A. Four. Four different records.
>
> (Record pp. 27-28.)

Aside from the fact that this evidence was incompetent, and not the best evidence, the records themselves being available, the testimony leaves this defendant unconcerned.

He is not answerable for the fraud if three or four youths tried to palm themselves off as his mother's son. Whether they succeeded in their unlawful efforts, Mr. Erbs is careful not to say. It is fair to assume that the vigilant officers of the immigration service detected the spurious character of their claims and sent them back to the land of their father's. Any other assumption would not be flattering to the service Mr. Erbs is attached to.

The significant thing in this connection was the indisposition of the Assistant U. S. Attorney to introduce the records and let them speak for themselves. He had them with him in court. (Record p. 28.)

Of course it is patent that having alleged defendant gained admission into this country by false and fraudulent claim of citizenship, the charge is not sustained by hinting that some one else did.

Although available, it is noteworthy that the government did not call Lee Dan, an original witness for defendant whom Mr. Erbs questioned at the Immigration Station. A statement had been taken from him concerning defendant under circumstances which also made it impossible for him to have access to his original testimony; and if he had been an unworthy witness giving false testimony, it is incredible that after the lapse of six years he could be taken over the same questions without that fact becoming apparent. We can't assume that the government failed to call him out of consideration for the defendant. On the contrary, the government declined to call him because it was well aware that his testimony accorded in all particulars with defendant's.

The only findings of fact made by the judge, read as follows: (Record p. 77-78.)

> That said Lee Sai Ying alias Lee Hung Chong, is a Chinese person and a person of Chinese descent and was born in China and is a subject of the Chinese government; that he is a Chinese laborer; that he was found within the limits of the United States, to wit, in the City and County of Honolulu, Territory of Hawaii, on or about the 18th day of May, 1927, without a Certificate of Residence required by the Act of Congress entitled "An Act to Prohibit the Coming of Chinese Persons to the United States," approved May 5,

1892, as amended November 3, 1893; and that the said Lee Sai Ying, alias Lee Hung Chong, did not establish by affirmative proof to the satisfaction of this Court his lawful right to remain in the United States.

Considering the evidence before the court, these findings could hardly be expected. The court found defendant was *"born in China and is a subject of the Chinese Government."* There is not a scintilla of evidence that he was born in China or that he owes allegiance to the government of that country. On the contrary, all the evidence without contradiction is that defendant was born in Hawaii and hence is a citizen of this country. The second item of the findings, that he was found here without a Certificate of Residence, is sheer nonsense, and only illustrates again what was illustrated in the *Ching Hong Yuk Case*: the unwillingness of the Court to concede any probative value to Certificates of Identity. Findings of fact which the charge naturally suggests were not made.

The Government charged fraud but offered no evidence tending to support the charge. On the contrary its evidence negatived the possibility of fraud. The defendant, called as a witness for the government [*we submit, the government is bound by his testimony*] testified to his Hawaiian birth, which is uncontradicted. The only other witness except for formal matters of no consequence here, was Inspector Erbs and certainly by no stretch of the imagination can any fraud imputable to defendant be gleaned from his testimony. The only part where even the subject of fraud may be inferred is quoted above, and that relates to three or four Chinese boys who tried, unsuccessfully we assume, to masquerade as his mother's children.

In view of the record and the failure of the judge to make essential findings, it seems hardly necessary to quote

authorities. We recognize that the burden is on a Chinese person under the Exclusion Act to establish his right to remain, but we submit the defendant more than met the burden in this case.

Ng Fung Ho vs. White, 266 Fed. 765
Ex Parte Wong Yee Looy, (D. C.) 227 Fed. 247
Wong Yee Toon v. Stump, 233 Fed. 195, 196, 147 (4th Circuit) C. C. A. 200
U. S. v. How Lim, (D. C.) 214 Fed. 456, at 463.

Certificates of Identity are issued under authority of Rule 20, Subdivision 8, of the Bureau of Immigration's Regulations relating to Chinese. It reads:

> "When (a certificate of identity) is issued to a person of Chinese descent, as a United States Citizen by birth or descent, *the certificate will be accepted thereafter as evidence of the holder's right to reside in the United States.*"

This is a departmental regulation made pursuant to law and having the force and effect of law.

The Government takes the position that the court should ignore the importance of the fact that defendant when arrested unexpectedly in 1927 was immediately grilled by an Inspector under circumstances which precluded possibility of access to his original testimony and yet, when taken over the same questions as in 1922, touching his family history, recent and remote, place of birth, residence in China and many minor matters, his answers accorded with his 1922 testimony in every particular, with the single exception of the character of his mother's feet. We submit that this discrepancy is fully explainable on the basis of error of interpretation or mistaken transcription. Note how the question was asked, and the answer:

Q. Are your parents living?

A. Yes; father Lee Long, alias Lee Ping Pong, age 61, and mother Wong Shee, 51, natural feet. (Record p. 56.)

Defendant and the interpreter must have engaged in a colloquy before the answer was given.

The authorities amply establish the rule that before a court will order a defendant banished on the ground that he gained his admission by fraud, the facts relied on to establish the fraud must be made clearly to appear in the evidence. Mere suspicion or conjecture do not suffice. And fraud cannot be inferred from slight discrepancies.

Go Lun v. Nagle, 22 (2nd) Fed., p. 246
Dong Ming v. Nagle, 20 (2nd) Fed., p. 388
Chan Sing v. Nagle, 22 (2nd) Fed., p. 673.

The arrest of defendant in 1927 was unlawful, his imprisonment was unlawful, and the statement made by him while thus under unlawful restraint was improperly admitted, over his objection.

Charley Hee, 19 (2nd) Fed., p. 335.

The admission of this statement was over defendant's objection and exception. (Record p. 24.)

CONCLUSION.

We submit, that after a certificate is issued the burden of attack is on the government to show fraud if it wishes to deprive the holder of its benefits, and fraud is never presumed. On the contrary the presumption is that the officers who admitted defendant in 1922 were conscientious and performed their duty honestly and properly, and as there is not the slightest evidence that they did otherwise or that

defendant has been guilty of fraud or any wrong doing in connection with his admission, we submit the court should follow its decision in the *Ching Hong Yuk* case and order the defendant discharged.

Respectfully submitted,

LESLIE P. SCOTT and
WILMER H. EBERLY,
Attorneys for Appellant.

No. 5494

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

LEE SAI YING, alias LEE HUNG CHONG,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

Upon Appeal from the United States District Court for the Territory of Hawaii

GEORGE J. HATFIELD,
United States Attorney.

GEORGE M. NAUS,
Asst. United States Attorney.

SANFORD B. D. WOOD,
United States Attorney.

CHARLES H. HOGG,
Asst. United States Attorney.

Attorneys for Appellee.

Neal, Stratford & Kerr, S. F.

No. 5494

IN THE

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FOR THE

NINTH CIRCUIT

LEE SAI YING, alias LEE HUNG CHONG,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

Upon Appeal from the United States District Court for the Territory of Hawaii

STATEMENT

This is an appeal from the decision of the United States District Court for the Territory of Hawaii in a proceeding begun therein under the provisions of the Chinese Exclusion Act ordering the deportation of appellant from the United States.

In the complaint filed on the 18th day of May, 1927, the appellant was charged with being a person of Chinese descent and a Chinese laborer within the

United States and within the jurisdiction of the United States District Court for the Territory of Hawaii without the certificate of residence required by the Exclusion Act; that he unlawfully obtained admission into the United States by false and fraudulent representation and claim of citizenship, and that he is not lawfully entitled to be or to remain in the United States [Record 3-4.] On May 27, 1927, appellant appeared in court and entered a plea of not guilty to the charges [Record 5.]

The appellant arrived at the port of Honolulu from China on November 27, 1922, applied for admission to the United States on the ground of being Hawaiian born and was admitted as Hawaiian born on December 6, 1922 [Record 68.] At the hearing before the court on June 8, 1927, it was shown that appellant was of the Chinese race, a laborer, within the United States and within the jurisdiction of the trial court without a certificate of residence required by the Exclusion Laws [Record 10-12, 36]; that a certificate of identity issued the appellant by the immigration official in charge at the port of Honolulu on the 1st day of February, 1923, was offered and received in evidence [Record 21-22.] The complete immigration record of appellant including the examination of appellant and his witnesses just prior to his admission in 1923 and the examination of appellant on May 17, 1927, by the immigration officers at Honolulu relative to his lawful right to remain in the United States was also admitted in evidence [Record 24.] The departure record of appellant as appears on the record of his examination

prior to his admission in 1923, shows that "Lee Long, wife and child departed by SS 'City of Peking' October 9, 1897" [Record 68.] The same record appears in the Public Archives of the Territory of Hawaii [Record 26.] It was shown that four (4) boys came to the United States claiming to be the son of Lee Long, who departed October 9, 1897 [Record 27, 53.]

At the hearing before the board of special inquiry the testimony of appellant and three witnesses, viz., Jong Tai Fong, alias Jong Dat Lin; Lee Tan, alias Lee Pui Nam, and Lee Man Kwai, alias Lee Yin Hoo, was taken and considered.

The appellant testified that his name was Lee Sai Ying alias Lee Hung Chong, 27 years of age, born at Smith and Hotel streets, Honolulu, KS. 21-2-25 (March 21, 1895), that his parents so told him; that father was Lee Long alias Lee Ping Pong, and his mother was Wong Shee, natural feet; that he was taken to China by his parents during the 12th month of KS. 23, (December 24, 1897, to January 21, 1898); that the house in which the family lived in their native village in China was near the tail of the village, near the hill. That he knew Lee Man Kwai and Chung Dai Fong but had not seen Lee Dan in China, that he last saw Lee Man Kwai some five or six years prior thereto. When asked when he had last seen Chung Dai Fong (meaning Jong Tai Fong) appellant answered, "He came back to Hawaii this year." Appellant testified that he had not seen Lee Dan in China [Record 55-60.]

Witness Jong Tai Fong alias Jong Dat Lin, testified that prior to his coming to Hawaii in 1898, he visited the house of appellant's father in China, who told him that he had taken "the boy to China a short time ago." It does not appear from what country the father took the boy when he took him to China. The witness further testified that he did not again see the appellant until 1921, when he made a trip to China, some twenty-three years after first seeing him; that appellant's mother, Wong Shee, had natural feet; and that appellant's home was "near the center part of the village—interior part—not outside" [Record 62.] He fixes the birthplace of appellant but does not state the source of his information, and the witness was in China [Record 61] when appellant claims to have been born, and testified he saw him in China before coming to Hawaii.

Lee Tan alias Lee Pui Nam, testified that he knew the parents of appellant and knew that appellant was born in Honolulu because he, the witness, "was a bookkeeper in the corner opposite the house where he lived before and saw him;" that he had not seen appellant since he, the appellant, went to China, some twenty-four years prior to the hearing. No effort was made to have this witness identify the appellant. This witness also testified that the mother of appellant had natural feet.

Lee Man Kwai, alias Lee Yin Hoo, testified that he came to Hawaii in KS. 21 (1895) and that appellant was born "little after a year after I came here." This statement cannot be true, as appellant fixes the

date of his birth at March 21, 1895. When the witness' attention was called to this discrepancy, he stated that some four or five months after his arrival here he called at the home of appellant and appellant "was born then." He also testified that appellant's mother had natural feet; also that he saw the family on all his trips to China, but he does not state when he made those trips, nor does he say when he saw appellant on any of his trips to China.

The appellant, on May 17, 1927, made a voluntary statement under oath to the immigration officers wherein he stated that when he was 13 or 14 years of age his parents for the first time told him he was born in the Hawaiian Islands [Record 36], that before that time he did not know where he was born [Record 37.] On being questioned relative to his mother's feet, appellant testified that when he left China she had bound feet [Record 38], that she had never unbound her feet, that she had always to his knowledge had little feet and bound, that she did not walk a natural gait as other women but walked stiffly, that her feet were "about five inches in length with shoes on," that he had always lived with his mother until he came here in 1922, and there was no excuse for his stating that his mother had natural feet [Record 39]; that he did not know when either of his parents came to Hawaii; that he never saw his witness Lee Tan in China [Record 45]; that he saw his witness Lee Man Kwai in China only once and that was about a year before he came over here [Record 47], contradicting his own testimony given in 1922 [Record 58] wherein he stated he last

saw Lee Man Kwai "five or six years ago" [Record 58.]

At the court hearing appellant was asked the name of his mother and answered, "Wong, her surname is," and when asked the rest of the name, he answered, "Her name is Wong, that is all I know." [Record 15.] Appellant could not remember when his alleged father told him he could come back to Hawaii because he was born here: [Record 16], nor could he remember anything his parents told him about the Hawaiian Islands or the life here, [Record 17] nor could he tell why he went to the grocery store of L. Kwai You immediately upon his arrival [Record 18.]

ARGUMENT

I.

AFTER IT WAS SHOWN THAT APPELLANT WAS OF THE CHINESE RACE AND A LABORER WITHOUT A CERTIFICATE OF RESIDENCE, THE BURDEN WAS WITH HIM TO SHOW AFFIRMATIVELY HIS LAWFUL RIGHT TO REMAIN IN THE UNITED STATES.

The above announced rule is so consistently supported by decisions and statutes and so generally recognized and followed that it is hardly worth while to cite authorities in its behalf. However, we will mention the cases of Chin Bak Kan v. United States, 186 U. S. 193, 200; Lee Hing v. United States, 295 F. 642; and United States v. Goon Bon June, 19 F. (2d) 333. Section 284, Title 8, U. S. Code, provides that one arrested under the provisions of this chapter shall be adjudged to be unlawfully within the United States

unless he shall establish by affirmative proof to the satisfaction of the court his lawful right to remain in the United States. The requirements of the statute cannot be avoided by a mere assertion of citizenship. The facts on which such claim is rested must be made to appear. Chin Bak Kan, supra. The statute demands proof to the satisfaction of the court, not merely a preponderance of evidence. A preponderance of evidence might not be proof to the satisfaction of the court. Mere assertions of one claiming citizenship based on statement of parents is not sufficient. The facts on which the claim is rested must be made to appear. Soo Hoo Yee, 3 F. (2d) 592; United States v. Boon Bon June, 19 F. (2d) 333. The Government is not called upon in any event to introduce proof that a defendant Chinese is not a citizen of the United States. Doo Fook v. United States, 272 F. (2d) 80.

A careful reading of the testimony given the board of special inquiry in 1922, convinces one beyond doubt that appellant should not have been admitted to the United States.

The testimony of Lee Tan alias Lee Pui Nam, may be cast aside as having no probative value. While he testified appellant was born in Honolulu, his reason for so testifying is given in the words that he was "a bookkeeper in the corner opposite the house where he lived before and saw him." The witness admits that he never saw appellant from the time the latter left the Islands until his return some twenty-five years later. No attempt was made to identify appellant on his arrival in 1922 [Record 63-64.]

The testimony of Lee Man Kwai, alias Lee Yin Hoo, is likewise weak and unconvincing. He testified that he came to the Islands during KS. 21, which in our time covers the period from January 26, 1895, to February 12, 1895, and that appellant "was born little after a year after I came here." Upon being informed that appellant claimed to have been born in the second month of KS. 21, and shown the inconsistency, he stated:

> "I was admitted here on the first month.
>
> Q. And he was born a year later, was he?
>
> A. I do not know where he lived when I first came here—I went to his house 4 or 5 months later.
>
> Q. Did you see the applicant at that time or was he born later?
>
> A. He was born then." [Record 64-67]

The remaining witness, Jong Tai Fong, alias Jong Dat Lim, testified that he first saw appellant in his father's house in China, before the witness came to Hawaii, and stated that the father "told him he took the boy to China a short time ago". This witness further testified that he did not see appellant again until "last year when I went back to China," some twenty-three years after seeing him before coming to the Islands.

The declaration of the Court in Gee Fook Sing v. United States (CCA 9), 49 F. 146, 148 and in Wong Ching (CCA 9), 244 F. 410, 412, seems aptly applicable to the facts in this case. The Court said that

the testimony of a Chinese person desiring to enter the United States, declaring he was born here, taken back to China by his parents at an early age, lived there continuously until after passing his majority, and all that he knows of the place of his birth is what his parents told him, deserves very little credence as to the place of his birth; and corroboration by Chinese who confess they have seen him but once or twice during such period of absence is but little, if any, better than hearsay evidence. Mere assertion of being native born based solely on statements of parents is not sufficient to establish the claim of citizenship in a deportation proceeding where the right to remain rests solely upon the citizenship of the defendant. The facts, incidents and circumstances upon which the claim is vested, must be made to appear. Soo Hoo Yee v. United States, 3 F. (2d) 592; United States v. Goon Bon June, 19 F. (2d) 333; Chin Bak Kan v. United States, 186 U. S. 193.

In this case we do not find any corroborative facts, incidents or circumstances. The appellant was not able to remember or relate anything told him by his parents relative to the Islands or life here. The claim of appellant is built on assertions only. The appellant testifies that he was not informed of his birth in the Islands until he was 13 or or 14 years old and before that age did not know where he was born [Record 37.] Quite an unlikely situation to say the least. It may not be out of place to suggest attention to the rule laid down in Ex parte Jew You On, 16 F. (2d) 153, 154, that the bare oath of three or four Chinamen, or

other persons, may not necessarily be accepted to prove the citizenship of a Chinese in a deportation proceeding. Were it otherwise, the exclusion policy of the Government would be futile and Chinese admitted to this country would be limited solely by the extent of their courage to take advantage of opportunity.

II.

MATERIAL CONTRADICTIONS AND DISCREPANCIES RELATIVE TO HOME AFFAIRS AND FAMILY RENDERS A CLAIM OF CITIZENSHIP OF A CHINESE PERSON INCREDIBLE.

Contradictions in the testimony of a petitioner and discrepancies between his testimony and that of his witnesses relative to home affairs and family may reasonably render incredible his claim to have been born in the United States when his right to remain is based solely upon his citizenship. Ong Foo v. Nagle, 22 F. (2d) 774; Go Lun v. Nagle, 22 F. (2d) 102.

The contradictions in the testimony of appellant and the discrepancies between his testimony and that of his witnesses is pronounced and relate to the home and family of appellant. There can be no occasion for a mistake relative to the feet of one's mother or to the location of the family home in the native Chinese village. In 1922 before the board of special inquiry, the appellant testified that his mother had natural feet [Record 56] and this declaration was followed by each and all his witnesses. Jong Tai Fong, alias Jong Dat Lim [Record 61], Lee Tan alias Lee Pui Nam [Record 63], and Lee Man Kwai, alias Lee Yin Hoo [Record 66]; each and all gave positive testimony that the mother had natural feet. When appel-

lant was examined by the immigration officers on May 17, 1927, relative to his right to remain in the Islands, the question of the condition of his mother's feet was approached from every possible angle and while on some occasions appellant indicated he would like to harmonize his testimony with that given in 1922, he positively stated on each and every occasion that his mother had bound feet. That he lived at home with his mother prior to his coming to Honolulu and should know the condition of her feet [Record 38, 39, 49, 50.] Again we find discrepancies relative to the location of appellant's home in his native Chinese village. Appellant in 1922, before the board of special inquiry, testified that his home was near the tail of the village, near the hill [Record 58.] He again so testified on May 17, 1927 [Record 44] and is supported by the testimony of Lee Man Kwai [Record 67] but is contradicted by Jong Tai Fong, who looked up the home before coming to Hawaii and who visited the home again the year preceding his giving his testimony and who testified that the home of appellant is "near the center part of the village—interior part—not outside," "not near the sea nor the mountain" [Record 62.] Appellant testified in 1922 that his mother's name was Wong Shee, and when asked her name in the hearing in court said, "Wong, her surname is," and when asked for the rest of the name, replied, "Her name is Wong; that is all I know."

III.

FORMAL PLEADINGS ARE NOT REQUIRED IN DEPORTATION PROCEEDINGS.

Formal complaint or proceeding is not required in deportation proceeding and the want of them does not affect the authority of the court or the validity of the statute. Fong Yue Ting v. United States, 149 U. S. 678, 729; Chin Bak Kan v. United States, 186 U. S. 193, 199; Ah Son v. United States, 200 U. S. 161.

It was also declared that technical objections to the form of the warrant in deportation cases are not sustainable when it appears that the applicant had notice of the actual charges against him in time to meet the same and have a fair trial. Ex parte Wong Yee Toon, 227 F. 247, 250; Ekue v. United States, 142 U. S. 650; U. S. v. Hom Lim, 223 F. 520.

Appellant was charged with being a person of Chinese descent and a laborer and not possessing a certificate of residence as required by the Exclusion Act, and not lawfully entitled to be or remain in the United States. We respectfully contend that that is sufficient to give appellant notice of the charges against him. No complaint is made that he did not have time to meet the same or that he did not have a fair trial. No evidence of fraudulent or false representation or claim was offered because none was needed. The way in which the appellant entered the United States and his status upon and after entry did not call for such evidence or proof.

IV.

ADMINISTRATIVE ACTION IN PERMITTING A CHINAMAN TO LAND IN THE UNITED STATES IS NOT FINAL OR DETERMINATIVE

Sections 153 and 174, Title 8, U. S. Code, make the decision on the question of admission of an applicant final only when adverse to his admission, and then only when approved by the Secretary of Labor. Executive action in permitting an applicant to land is not in any sense judicial, and does not embarrass a court inquiring into the truth of such order.

The force and effect of the executive or administrative action in admitting an applicant to this country and the action of immigration officials issuing a certificate of identity to one so admitted is fully discussed in the brief of appellee in the cause of Lum Man Shing, alias Lum Kam Hoo, v. United States, numbered 5474, now under submission in this court, and as the counsel for appellant in that case is the counsel for appellant in this case, it was considered unnecessary to reprint in full in this case the argument on those points, so reference is respectfully made to appellee's brief, case numbered 5474.

CONCLUSION

We submit that certificate of identity was not sufficient to throw on the Government the burden of proving that appellant entered the United States by fraudulent means, or that the possession of such certificate in any way determined appellant's right to remain in the United States, or in any way determined

his citizenship, or in any way stood in the way of the Court in determining whether appellant established a lawful right to remain in the United States, and we submit that the trial court did not err in ordering the deportation of appellant, and that the decision of that court should be affirmed.

Respectfully submitted,

GEORGE J. HATFIELD,
United States Attorney.

GEORGE M. NAUS,
Asst. United States Attorney,

SANFORD B. D. WOOD,
United States Attorney,

CHARLES H. HOGG,
Asst. United States Attorney,
Attorneys for Appellee.

No. 5495

United States Circuit Court of Appeals

For the Ninth Circuit.

TERESA CASELLA,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Petitioner and Appellant:
JULIAN D. BREWER, Esq., 41 Sutter St., San Francisco, California.

For Respondent and Appellee:
U. S. ATTORNEY, San Francisco, Calif.

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 19,555.

In the Matter of TERESA CASELLA on Habeas Corpus.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled District Court:

Sir: Please prepare transcript on appeal in the above matter and insert therein the following papers, pleadings and orders in said proceeding to wit:

1. Petition for writ of habeas corpus (omitting therefrom the copy of the record of the proceedings before the immigration authorities, inasmuch as it has been stipulated that the original record of these proceedings may be transmitted to the Clerk of the Circuit Court of Appeals, with a further stipulation that the same need not be printed in the transcript of the record).

2. Order to show cause.

3. Demurrer to petition.

4. Judgment and order sustaining demurrer and denying petition for writ of habeas corpus.

5. Notice of appeal.

6. Petition for appeal.

7. Assignment of errors.

8. Order allowing appeal. [1*]

9. Stipulation and order concerning record of deportation proceedings.

9–A. Citation on Appeal.

10. Praecipe for transcript.

Dated February 3, 1928.

JULIAN D. BREWER,
Attorney for Petitioner and Appellant.

[Endorsed]: Service of the within notice of appeal, petition for appeal, order allowing appeal and praecipe for transcript on appeal is duly admitted this 3 day of February, 1928.

GEO. J. HATFIELD.

Filed Feb. 3, 1928. [2]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

19,555.

In the Matter of TERESA CASELLA on Habeas Corpus.

*Page-number appearing at the foot of page of original certified Transcript of Record.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable United States District Judge now Presiding in the United States District Court, in and for the Northern District of California, Second Division:

The petition of Mrs. Mary E. Fuella respectfully shows:

I.

That your petitioner is the daughter of Teresa Casella, the detained above named, and makes this petition for and as the act of her said mother because her detention, as hereinafter set forth, makes it impossible for her to verify this petition on her own behalf.

II.

That your petitioner's said mother, Teresa Casella, is forcibly detained and restrained of her liberty by color of the authority of the United States in the custody of John D. Nagle, Esq., Commissioner of Immigration for the port of San Francisco, California.

III.

That the sole claim and sole authority by virtue of which the said John D. Nagle, Commissioner of Immigration as aforesaid so restrains and detains your petitioner's said mother is a certain paper which purports to be a warrant of deportation dated September 14, 1927, and signed by W. N. Smelzer, Assistant to the United States Secretary of Labor.

[3]

IV.

That upon information and belief the said warrant of deportation was issued by said W. N. Smelser, Assistant to the United States Secretary of Labor in a certain proceeding before the immigration authorities at the port of San Francisco upon the charge that your petitioner's said mother, Teresa Casella, had been found in the United States in violation of the Immigration Act of February 5, 1917, to wit, "that she has been found managing a house of prostitution, or music or dance hall or other place of amusement or resort habitually frequented by prostitutes." That your petitioner's said mother, Teresa Casella, the detained, had a trial or hearing during said proceedings before the immigration authorities at San Francisco and at the conclusion of which said detained was adjudged an alien found in the United States violating the immigration laws on the grounds as aforesaid and she was ordered deported by said Secretary of Labor, said order being for deportation to Italy.

V.

That attached hereto and made a part hereof, as certified by W. E. Walsh, Inspector in charge of the San Francisco office of the United States Immigration Service, in his letter of December 30th, 1927, is a complete copy of the record of the hearing accorded to the detained at San Francisco, including a copy of the warrant issued for her arrest and a copy of the warrant directing her deportation to Italy.

VI.

Upon information and belief your petitioner's said mother, Teresa Casella, the detained, was not guilty of nor was not found "managing a house of prostitution, or music or dance hall or other place of amusement or resort habitually [4] frequented by prostitutes."

VII.

Upon information and belief the said order of deportation of your petitioner's said mother from the United States to Italy is illegal and contrary to law for the following reasons, to wit:

First: That the trial or hearing of the detained before the immigration authorities at San Francisco was manifestly unfair and that there was a manifest abuse of the authority committed to them by the statutes in each of the following particulars:

(a) The annexed copy of the record of the hearing accorded the detained by the immigration authorities at San Francisco on April 20th, 1927, conclusively shows that a sworn statement was taken from the detained by an immigration inspector in Sacramento, California, on February 26th, 1927, and that the same was exhibited to the detained at said hearing. However, the immigration authorities, as it would appear from the record, in violation of the rights of the alien and immigration law and procedure, and without the knowledge or consent of the detained, attached to the record a damaging statement which purports to have been taken from the detained on an entirely different date from

the one referred to at the hearing, to wit, one which purports to have been taken from the alien on February 25th, 1927. The purported statement referred to is among the papers in the annexed record and is marked Exhibit "A." The rights of detained were greatly prejudiced by said statement which detained never had an opportunity to deny, refute or explain. That this alleged statement of the detained dated February 25th, 1927, worked an injustice on her is shown by the fact that it was made one of the [5] principal bases upon which the detained was ordered deported, as clearly shown by specific reference to its contents by the examining inspector, T. E. Borden, in his summary and recommendation which is part of the annexed record and marked Exhibit "B."

(b) The annexed copy of the record of the hearing accorded the detained on the date and at the place aforesaid conclusively shows that a certain letter purported to have been written by Inspectors A. J. Phelan and P. J. Farelly on February 26th, 1927, was incorporated in the record without the same having been shown to the detained or her attorney. However, the immigration authorities, as it would appear from the record, in violation of the rights of the alien and immigration laws and procedure, and without the knowledge or consent of the detained, attached to the record a damaging letter which purports to have been written by said Inspectors A. J. Phelan and P. J. Farelly on an entirely different date from the one referred to at the hearing, to wit, a letter written by them in refer-

ence to the detained dated February 25th, 1927. The purported letter referred to is among the papers in the annexed record and is marked Exhibit "C." The rights of detained were prejudiced by said letter or any other letter which may have been introduced at said hearing, because the record conclusively shows that no letter signed by Inspectors Phelan and Farelly was ever shown to the alien or to her attorney during the hearing, nor does the record of the hearing make mention of the letter of February 25th, 1927, which, without the knowledge or consent of the alien and without her having an opportunity to deny or refute [6] was added to the record. That the letter of February 25th, 1927, injured the detained is conclusively shown by the summary and recommendation of the examining inspector, T. E. Borden, in which specific reference is made to the contents of this letter and which was one of the bases for his recommendation of deportation, which is part of the annexed record and marked Exhibit "B."

(c) That when the original record of the proceedings in this matter were forwarded to the Secretary of Labor at Washington, D. C., after the hearing, the Secretary of Labor, or his assistant, illegally and contrary to law likewise based his order of deportation upon the aforesaid purported statement of the alien taken February 25th, 1927, and the letter of Inspectors Phelan and Farelly dated February 25th, 1927, as is shown by reference to his memorandum of findings attached to the original record now in the possession of the United

States District Attorney. This is further proof that detained was not accorded a fair hearing.

(d) That further, in making part of the record, the purported statement of the alien taken on February 25th, 1927, marked Exhibit "A," and which, according to the record, was not under consideration nor shown to the detained nor to her attorney, evidence was received and acted on without the knowledge or consent of the detained, which was entirely irrelevant to the issue. The charge against the alien as hereinbefore stated, was that she had been found "managing a house of prostitution, music or dance hall or other place of amusement or resort habitually frequented by prostitutes." The purported statement of the alien taken February 25th, 1927, contains no statement bearing upon the charge set forth above. Her alleged admission that she had "sported in Alaska" which, if done at all, was done [7] before coming to the United States some thirteen or fourteen years ago, was one of the principal reasons given by T. E. Borden, the examining immigration inspector, in his summary and recommendation (Exhibit "B") why she should be deported on the charge aforesaid. In other words, contrary to law, she was charged with one offense and ordered deported upon purported testimony at worst relating to a different offense altogether which, if it occurred, took place thirteen or fourteen years before in Alaska.

(e) That in the warrant of arrest of the detained, part of the record of the case herein marked Exhibit "D" that "she has been found in the

United States in violation of the Immigration Act of February 5, 1927, for the following, among other reasons: that she has been found managing a house of prostitution, or music or dance hall, or other place of amusement, or resort, habitually frequented by prostitutes." That this warrant of arrest was in violation of the law for the following reason, to wit: It would appear from the warrant of arrest that there were more reasons (which were not disclosed to the alien) for her arrest other than those set forth in the warrant. This fact is clearly contrary to law because defendant was never advised of what "among other reasons" consisted of or referred to and therefore could not meet them in any way.

Second: That there is no substantial evidence in the record to sustain the action of the Secretary of Labor in his finding that the detained had been found "managing a house of prostitution, or music or dance hall, or other place of amusement or resort habitually frequented by prostitutes." There is no evidence to show that an act [8] of prostitution was ever committed in detained's boarding-house at Sacramento, California. There is no evidence to show that detained's boarding-house at Sacramento had a reputation as a house of prostitution or as a place or resort habitually frequented by prostitutes or that prostitutes were ever there. Eliminating the purported statement taken from the alien on February 25th, 1927, and the purported letter by Inspectors Phelan and Farelly dated Feb-

ruary 25th, 1927, which were not referred to during the hearing and which legally have no place in the record, there is no semblance of substantial proof against the detained on the charge and that under the circumstances and irregularities pointed out herein it was error of law for the immigration authorities to recommend the deportation of detained upon the record herein.

Third: That the Secretary of Labor has no jurisdiction to deport the detained and his order so to do is in contravention of law because until the immigration proceedings or hearings are regular, "due process of law" which the detained is entitled to has not been accorded the alien and which must obtain before the Secretary of Labor has jurisdiction to deport an alien in this country.

VIII.

That it is the intention of John D. Nagle, Esq., the said Commissioner of Immigration of the port of San Francisco, to deport the said detained out of the United States and away from the land of which she has long been a resident on or about the 10th day of February, 1927, and unless this court intervenes to prevent said deportation, the said detained will be deprived of residence in the United States. [9]

IX.

That on October 14th, 1927, your petitioner filed a petition for writ of habeas corpus in behalf of her mother and that on said day the above-entitled

court made an order to show cause in relation thereto. That thereafter the United States District Attorney interposed a demurrer to said petition and that on December 3d, 1927, the demurrer was sustained and your petitioner's petition dismissed and the detained was ordered surrendered. That the aforesaid petition filed on October 14th, 1927, was drawn by counsel representing your petitioner, who did not have a copy of the record of the proceedings before the immigration authorities in reference to your petitioner's mother, Teresa Casella, as hereinabove set forth and that therefore your petitioner's former attorney was incapable of presenting a petition accurately setting forth the grounds why the writ should be issued. The within writ is accompanied by the record in the proceedings and contains different and additional grounds why your petitioner believes the writ should be issued as prayed herein.

WHEREFORE your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to John D. Nagle, Esq., Commissioner of Immigration of the port of San Francisco, commanding and directing him to hold the body of said detained within the jurisdiction of this court, and to present the body of the said detained before this court at a time and place to be specified in said order, together with the time and cause of her detention so that the same may be inquired into to the end that the said detained may be restored to her liberty and go hence without day. [10]

Dated at San Francisco, California, January 3d, 1928.

MRS. MARY E. FUELLA,
(J. D. B.)
Petitioner.

JULIAN D. BREWER,
Attorney for Petitioner and Detained Herein.

[11]

United States of America,
State of Nevada,
County of Washoe,—ss.

Mrs. Mary E. Fuella, being duly sworn, deposes and says: That she is the petitioner named in the foregoing petition; that she has read the foregoing petition and knows the contents thereof and that the same is true of her own knowledge except as to those matters stated therein on information or belief and as to those matters that she believes it to be true. That she is the daughter of Teresa Casella, the detained herein, of the age of 23 years, *years,* and that she makes this verification for and on behalf of her said mother, Teresa Casella, because her said mother is detained by the immigration authorities of San Francisco at Angel Island and is unable to verify this petition.

MRS. MARY E. FUELLA.

Subscribed and sworn to before me this 3d day of January, 1928.

[Seal] J. D. POOLE,

Notary Public in and for Washoe County, State of Nevada.

My commission expires October 11, 1931.

[Endorsed]: Filed Jan. 6, 1928. [12]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Upon reading and filing the petition of Teresa Casella praying for issuance of a writ of habeas corpus, IT IS HEREBY ORDERED that John D. Nagle, Commissioner of Immigration for the port of San Francisco, California, appear before this court on the 16th day of January, 1928, at the hour of 10 o'clock A. M. of said day, to show cause if any he has why a writ of habeas corpus should not issue in this matter as herein prayed.

IT IS FURTHER ORDERED that John D. Nagle, Commissioner of Immigration as aforesaid, or whoever, acting under the orders of said Commissioner or the Secretary of Labor of the United States shall have the custody of said Teresa Casella, are hereby ordered and directed to detain the said Teresa Casella within the custody of the said Commissioner of Immigration and within the jurisdiction of this court until its further order herein.

IT IS FURTHER ORDERED that a copy of this order be served on the said John D. Nagle, or

such other person having the said Teresa Casella in custody as an officer of the said John D. Nagle.

Dated, San Francisco, California, January 9th, 1928.

FRANK H. KERRIGAN,
District Judge. [13]

[Endorsed]: Service and receipt of a copy of the within order to show cause, and a copy of the petition in the within matter are hereby admitted this 9th day of January, 1928.

GEO. J. HATFIELD,
U. S. Attorney.
By R. M. LYMAN,
Asst. U. S. Dist. Atty.
By A. J. PHELAN,
Inspector, U. S. Immigration Service.

Filed Jan. 10, 1928. [14]

[Title of Court and Cause.]

DEMURRER TO PETITION FOR WRIT OF HABEAS CORPUS.

Comes now the respondent, John D. Nagle, Commissioner of Immigration at the Port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts suffi-

cient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the hearing of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

GEO. J. HATFIELD,
By R. M. LYMAN, Jr.,
United States Attorney,
Attorney for Respondent.

[Endorsed]: Filed Jan. 21, 1928. [15]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 21st day of January, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable FRANK H. KERRIGAN, Judge.

[Title of Cause.]

MINUTES OF COURT—JANUARY 21, 1928—ORDER SUBMITTING DEMURRER.

This matter came on regularly this day for hearing on order to show cause as to the issuance of a

writ of habeas corpus herein. Counsel for petitioner and detained was present. R. M. Lyman, Jr., Esq., Asst. U. S. Atty., was present for and on behalf of respondent, and filed demurrer to petition, and all parties consenting thereto, IT IS ORDERED that the immigration records be considered as part of original petition. After argument by respective attorneys, the Court ordered that said matter be and the same is hereby submitted. [16]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 23d day of January, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable FRANK H. KERRIGAN, Judge.

[Title of Cause.]

MINUTES OF COURT—JANUARY 23, 1928—ORDER SUSTAINING DEMURRER, ETC.

It is ordered that the demurrer to the petition for writ of habeas corpus, heretofore submitted, be and the same is hereby sustained and said petition dismissed accordingly. [17]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Clerk of the Above-entitled Court and to the Honorable GEORGE J. HATFIELD, United States Attorney for the Northern District of California:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that Teresa Casella, the petitioner and detained above named, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the order and judgment made and entered herein on the 23d day of January, 1928, sustaining the demurrer to and denying the petition for a writ of habeas corpus filed herein.

Dated February 2d, 1928.

JULIAN D. BREWER,

Attorney for Petitioner and Appellant Herein. [18]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Now comes the above-named Teresa Casella, petitioner and appellant, and by her attorney, Julian D. Brewer, says that on the 23d day of January, 1928, an order and judgment was entered and made herein denying a petition in her behalf for a writ of habeas corpus prayed for and remanded her to the custody and imprisonment complained of in her said petition; and the petitioner

now says that in the record, proceedings and judgment herein manifest errors have occurred to the great prejudice and injury of petitioner, all of which more fully appears from her assignment of errors filed with said petition.

WHEREFORE the petitioner and appellant prays that an appeal may be granted in her behalf in the Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled matter as shown by the praecipe duly authenticated may be transmitted to the said Circuit Court of Appeals; and further, that the said appellant be allowed to remain at large under her present bail bond fixed at $1,000, pending the final determination of this matter.

Dated February 1st, 1928. [19]

JULIAN D. BREWER,

Attorney for Petitioner and Appellant Herein. [20]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes Teresa Casella, petitioner and appellant, by her attorney, Julian D. Brewer, and says that in the record and proceedings and judgment herein manifest errors have intervened to the great injury and prejudice of said appellant, who assigns said errors as follows:

1. That the Court erred in holding that the allegations contained in the petition herein for a writ of habeas corpus and the facts presented upon the issue in reference made and joined herein were insufficient in law to justify the discharge of petitioner from custody as prayed for in said petition.

2. That the Court erred in sustaining the demurrer and in denying the petition for a writ of habeas corpus herein and remanding the petitioner to the custody of the immigration authorities for deportation.

3. The Court erred in not holding that the proceedings for petitioner's deportation were manifestly unfair and that there was a manifest abuse of the authority committed [21] to the immigration authorities and the Secretary of Labor upon the allegations contained in the petition for a writ of habeas corpus and the facts presented upon the issue in reference to the record made and joined herein.

4. That the Court erred in holding that any competent or sufficient or any evidence warranting the deportation of petitioner had been adduced in said deportation proceedings.

5. That the Court erred in holding that the Secretary of Labor had jurisdiction to deport petitioner upon the evidence adduced at the hearing before the immigration authorities.

WHEREFORE petitioner and appellant prays that said order and judgment discharging the order to show cause, sustaining the demurrer, and denying the petition for a writ of habeas corpus be re-

versed and that this cause be remitted to said lower court with instructions to issue the writ of habeas corpus as prayed for in said petition.

Dated: February 3d, 1928.

JULIAN D. BREWER,
Attorney for Petitioner and Appellant.

[Endorsed]: Service and receipt of a copy of the within assignment of errors is hereby admitted this 3 day of February, 1928.

GEO. J. HATFIELD,
United States Attorney.

Filed Feb. 3, 1928. [22]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FOR SUPERSEDEAS AND BAIL.

Upon *read* and filing the petition of the above-named Teresa Casella presented by her attorney, Julian D. Brewer, for appeal and her assignment of errors presented therewith, IT IS ORDERED that the appeal as prayed for be, and it is hereby, allowed. And it appearing to the Court that a citation has been duly issued and served as provided by law, IT IS FURTHER ORDERED that petitioner and appellant be admitted to bail pending the final determination of the appeal in the sum of $1,000, the appeal to operate as a supersedeas. The cost bond on appeal is hereby fixed at the sum of $250.

IT IS FURTHER ORDERED that petitioner may remain at large until said appeal is decided, upon her present bail bond of $1,000, which is hereby accepted and continued in force for the purpose of said appeal.

Dated February 3d, 1928.

FRANK H. KERRIGAN,
District Judge. [23]

[Title of Court and Cause.]

STIPULATION THAT THE RECORD OF DEPORTATION PROCEEDING AGAINST APPELLANT BEFORE THE IMMIGRATION AUTHORITIES MAY BE TRANSMITTED TO THE CLERK OF THE CIRCUIT COURT OF APPEALS AND THAT THE SAME NEED NOT BE PRINTED IN THE TRANSCRIPT OF THE RECORD.

IT IS HEREBY STIPULATED that the record of the proceedings for the deportation of the above-named appellant and petitioner before the United States Immigration Authorities may be transmitted to the Clerk of the Circuit Court of Appeals for the Ninth Circuit and become a part of the record of this appeal and that the same need not be printed in the transcript of said record.

Dated February 3d, 1928.

GEO. J. HATFIELD,
United States Attorney.
T. J. SHERIDAN,
Asst. United States Attorney.
JULIAN D. BREWER,
Attorney for Appellant.

It is so ordered.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed Feb. 3, 1928. [24]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 24 pages, numbered from 1 to 24 inclusive, contain a full, true and correct transcript of the records and proceedings in the matter of Teresa Casella, on Habeas Corpus, No. 19,555, as the same now remain of file and of record in this office.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of nine dollars and fifty cents ($9.55), and that the same has been paid to me by the attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 15th day of May, A. D. 1928.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [25]

[Endorsed]: No. 5495. United States Circuit Court of Appeals for the Ninth Circuit. Teresa Casella, Appellant, vs. John D. Nagle, as Commissioner of Immigration for the Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed May 18, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5495

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TERESA CASELLA,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,

Appellee.

BRIEF FOR APPELLANT.

JULIAN D. BREWER,

Chancery Building, San Francisco,

Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 5495

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TERESA CASELLA,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from the order of the District Court for the Northern District of California sustaining the demurrer to a petition for a writ of habeas corpus and dismissing the petition.

The proceeding arose in the District Court by Mary E. Fuella, presenting in behalf of her mother, the appellant, a petition for a writ of habeas corpus praying for her release from the custody of appellee as Commissioner of Immigration for the Port of San Francisco (Tr. of R. pp. 3 to 13). An order was issued directing the appellee to appear and show cause why a writ of habeas corpus should not be issued as

prayed for (Tr. of R. p. 13). The appellee responded by filing a general demurrer to the petition (Tr. of R. pp. 14 and 15). At the hearing upon the demurrer it was stipulated that the immigration records and proceedings, the same which are before this court as exhibits by order of the District Court, be considered as part of the petition. The demurrer was thereafter sustained, and the petition for a writ of habeas corpus was dismissed (Tr. of R. p. 16).

FACTS OF THE CASE.

The appellant, a widow, native of Italy, of the present age of 42 years, has resided in the United States since July, 1919, when she lawfully entered the country at Vancouver, British Columbia. She is the mother of four children, two of whom died in British Columbia. Of the two remaining children, one is the petitioner in behalf of appellant for the writ of habeas corpus herein (Tr. of R. p. 3); the other child of appellant resides in Nanaimo, British Columbia, where appellant lived before coming to the United States. Appellant's husband was killed in a mine disaster several years prior to appellant coming to the United States. Her husband was a British subject by naturalization (Exhibit A, p. 13), but appellant has lost her residence there on account of having resided in the United States since 1919, hence the direction in the warrant of deportation (Exhibit A, p. 34) that she be returned to Italy, which country she has been away from continuously for over 25 years (Exhibit A, p. 14).

Appellant was arrested under a warrant issued by the Department of Labor on February 28th, 1927 (Exhibit A, p. 23), wherein it is alleged that appellant "has been found in the United States in violation of the Immigration Act of February 5th, 1917, for the following among other reasons: That she has been found managing a house of prostitution or music or dance hall, or other place of amusement, or resort, habitually frequented by prostitutes".

Appellant was accorded a hearing on said warrant by the immigration authorities at San Francisco on April 20th, 1927, at which the examining immigration inspector, introducing the Immigration Department's own evidence, had incorporated in the record a certain alleged statement taken from the appellant on February 26th, 1927, also a certain statement made by inspectors Phelan and Farrelly on February 26th, 1927 (Exhibit A, p. 16). (The court cannot be referred to the statements supposed to have been taken and made on February 26th because they nowhere appear in the record.) The record, however, does contain an alleged statement taken from the appellant on an entirely different date, to-wit, February 25th, 1927 (Exhibit A, p. 4), and a statement alleged to have been made by inspectors Phelan and Farrelly on a different date than the one referred to by the examining inspector at the hearing (Exhibit A, p. 16), to-wit, a statement alleged to have been made by said inspectors the day before, i. e., February 25th, 1927 (Exhibit A, p. 5).

Thereafter, at the hearing, inspectors Phelan and Farrelly were cross-examined by appellant's attorney.

Inspector Phelan testified (Exhibit A, p. 16) that he and inspector Farrelly visited the appellant's lodging house at Sacramento, California, on February 25th, 1927, and says:

"We walked up the stairs and this lady (meaning the appellant) met us, and after informal conversation, the details of which I do not now recall, the alien invited us into a room which opened off the hall; we talked in there for some time casually and then the alien asked us which of us desired to take on a girl first; I believe that we asked her if she had two girls and the answer was 'No, only one'. I volunteered to take on the girl first and the girl, who later gave the name of 'Young', was called in by the alien, and I accompanied her to another bedroom which opened off the corridor."

Inspector Phelan does not give one word of testimony as to what was said or done after he accompanied the Young woman to the other room, but continues his testimony by stating that the Young woman denied giving the appellant any ill gotten gains, but, on the other hand, had stated that she paid the appellant a dollar a day for her room. Inspector Phelan further testifies that the appellant did not offer to commit an act of prostitution; that the Young woman had stated that she had resided at appellant's place about two days; and that no act of prostitution was committed.

The testimony of inspector Farrelly (Exhibit A, p. 15), so far as it relates to the charge against appellant, is as follows, in substance: that he visited

appellant's lodging house accompanied by inspector Phelan on February 25th, 1927; that he saw the appellant there; that he and inspector Phelan had seen the alien two months prior and that she stated that she did not have a girl there; that on the second visit he and Phelan went into appellant's place; that appellant did not offer to commit an act of prostitution with either of them; that he saw Marcelle Young there at the time; that he had no conversation with the Young woman about committing an act of prostitution; that the Young woman had been at appellant's place about two days; and that he knew nothing further than what he had learned on these two visits.

There is no record of the inspectors taking any statement from Marcelle Young, the alleged prostitute, at any time, and she was not produced by the inspectors at the hearing.

The appellant testified (Exhibit A, pp. 15 and 14) that she was not committing acts of prostitution at her lodging house at Sacramento on February 25th, 1927; that she recognized the two inspectors; that Marcelle Young had never paid her any money obtained from practicing prostitution; that the Young woman had been at the lodging house for only two days before the inspectors came; that the Young woman was supposed to pay her $4 per week for her room, but had paid nothing yet; and that her lodging house was not a house of prostitution on February 25th, 1927.

Thereafter inspector T. E. Borden, who presided at the hearing, prepared his report of the proceed-

ings and recommended the deportation of the appellant on the grounds charged (Exhibit A, p. 11). The Board of Review of the Immigration Service at Washington upheld the recommendation to deport appellant, holding in its opinion (Exhibit A, p. 20) that the charges against appellant had been sustained. Thereafter W. N. Smelzer, Assistant Secretary of Labor, issued a warrant directing the deportation of appellant (Exhibit A, p. 34).

CONTENTIONS OF APPELLANT.

The contentions of appellant are:

I. That there is no substantial legal evidence in the record to sustain the charges against appellant for the following particular reasons:

(1) The ex parte unsworn letter of inspectors Phelan and Farrelly is inadmissible.

(2) The preliminary statement by appellant proves nothing against her with reference to the issues and is inadmissible.

(3) The oral testimony given at the hearing does not sustain the charges against appellant.

II. That the proceedings before the immigration authorities were manifestly unfair and that there was a manifest abuse of the authority committed to them by law in each of the following particulars:

(1) The warrant on which appellant was arrested and tried did not apprise appellant of the charges against her.

(2) At the hearing of the appellant the presiding inspector introduced into the record a letter signed by inspectors Phelan and Farrelly on February 26th, including a statement taken from appellant on the same date, whereas the record now discloses a letter written by these inspectors and a statement taken from the alien on a different date, to-wit, February 25th.

(3) The immigration inspector who presided at appellant's hearing at San Francisco justified his recommendation for deportation in part upon matter entirely foreign to the issues.

(4) The Washington Board of Reviews' recommendation to the Secretary of Labor that appellant be deported is based in part upon a statement that has no foundation in the record and in part upon matter not within the issues.

ARGUMENT.

I. THERE IS NO SUBSTANTIAL LEGAL EVIDENCE IN THE RECORD TO SUSTAIN THE CHARGE AGAINST APPELLANT.

(1) At appellant's hearing the presiding inspector, introducing the Government's own evidence, introduced a letter signed by inspectors Phelan and Farrelly dated "February 26, 1927", but a letter bearing a different date, that is, "February 25, 1927", is found in the record (Exhibit A, p. 5) and is as follows:

"Feb. 25, 1927.

Commissioner of Immigration,
Angel Island Station,
San Francisco, Calif.

Today we called the Chico Rooms in Sacramento and were met at the head of the stairs by a woman, whom we afterwards learned was the alien Teresa Casella. This woman took us into a room and after some conversation asked us if we wanted a girl. She stated that she had only one girl. We asked her to bring in the girl, which she did, and after some further conversation the alien asked us which one wished to take the girl on first. Inspector Phelan then took this girl, who later gave her name as Marcelle Young, into another room where she made preparations to commit an act of prostitution with him, naming a price of two dollars for an act. We then disclosed our identity and secured the inclosed statement from the alien.

ARTHUR J. PHELAN,
Arthur J. Phelan, Immigrant Inspector.
PATRICK J. FARRELLY,
Patrick J. Farrelly, Immigrant Inspector."

The foregoing letter, even though the one the presiding inspector had in mind when he "incorporated and made a part of the record report of immigrant inspectors Phelan and Farrally dated February 26, 1927", may have furnished a basis for the issuance of the warrant but was inadmissible at the hearing, it being an ex parte unsworn statement. The only damaging particulars of this letter relate to what was said or done by the Young woman after she was accompanied into "another room" by inspector Phelan and therefore is not admissible in evidence.

In *Yip Wah v. Nagle,* 7 Fed. (2d) 426, which involved similar elements to the present case, it is said by this court:

> "It was also improper to permit Farrelly to testify as to what Betty Hoffman (outside the presence of petitioner) had said to him. The statements so received were very damaging and having been made in appellant's absence, they were not evidence proper to be considered against him."

In the case of *Mouratis v. Nagle,* 24 Fed. (2d) 799, at p. 801, this court, passing upon a case involving similar elements to the present one, said:

> "We refer to these circumstances, not for the purpose of determining the creditability of witness or of resolving the weight of conflicting evidence but as emphasizing the legal impropriety of basing a vital finding of fact upon an answer in the nature of an assumption or conclusion, given to an incompetent ex parte question."

In *Whitfield v. Hanges,* 222 Fed. 754, cited by the court in *Yip Wah v. Nagle,* supra, the Circuit Court of Appeals says, with reference to the inadmissibility of ex parte preliminary statements:

> "The information gathered under the provisions of Section 12 (like the information gathered by the inspectors before the arrest) may be used as a basis for instituting prosecutions for violation of the law, and for many other purposes, but it is not available as such, in cases where the party is entitled to a hearing."

The letter quoted above shows upon its face that inspector Farrelly had no knowledge of what was said or done by inspector Phelan and the Young woman. It is surprising that a federal officer would sign a letter such as this containing statements that he personally knew absolutely nothing about.

(2) The record shows that the inspector who presided at the hearing introduced in the record a statement claimed to have been taken from appellant on February 26th, 1927 (Exhibit A, p. 16). The record, however, discloses a statement alleged to have been taken February 25th, 1927, and even if this one (Exhibit A, p. 4) was the statement intended to be introduced, it was inadmissible at the hearing. The Circuit Court, in passing on a similar proposition, said in *Ungar v. Seaman,* 4 Fed. (2d) 80, at page 84:

> "The facts that these aliens were arrested and immediately questioned by the arresting officer while they were in custody, without notice by the charges in the warrants of arrest or otherwise of the simple charge against them, without counsel, and without time or opportunity, before they were interrogated upon the merits of their cases, to prepare to meet the real charges against them, violated the basic requirements of due process and a fair hearing that the accused shall be notified of the charge against him before he shall be required to answer or commit himself upon the merits of his case."

Furthermore, the purported statement of the alien taken February 25th, 1927, contains no statement bearing upon the charge against the alien. Her alleged admission that she had "sported" in Alaska, which, if done at all, was done before coming to the United States some thirteen of fourteen years ago, could not, under any possible construction, be considered to relate to the charge against her "that she had been found managing a house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes". If appellant

had been charged with being a person unfit to remain in the United States on account of acts committed prior to coming to this country and there had been introduced competent evidence to show this, this alleged admission about what she did in Alaska may have been admissible, but the charge against her is not broad enough to cover this ground, although the immigration officers attempted, as will be pointed out, to make the warrant so broad that she might be deported upon any ground which the authorities might decide on subsequent to her arrest.

(3) With the unsworn ex parte letter quoted above eliminated from the record and the alleged statement taken from appellant discarded for showing nothing within the issue, the oral testimony given at the hearing is absolutely insufficient to substantiate the charges against the appellant. While inspector Phelan testified (Exhibit A, p. 16) that appellant asked him and inspector Farrelly "which of us desired to take on a girl first", and called the Young woman and that he "volunteered" and accompanied the woman to another room, his testimony ending as it does, without disclosing what, if anything, was subsequently said or done by the Young woman to indicate that she was a prostitute, has no probative force relative to the charges. Yet inspector Phelan, after being sworn at the hearing, had been given the widest possible latitude to testify by appellant's attorney, who asked him (Exhibit A, p. 16): "Just state what happened when you went into the rooming house." Neither inspector under oath testified that the Young

woman agreed to commit an act of prostitution with them or that she set a price for such an act. Neither testified that she made preparations to commit such an act. Neither of them testified that the Young woman admitted being a prostitute or ever having committed an act of prostitution whatever. Neither of them testified that the Young woman had a reputation as a prostitute. On the other hand, Phelan did testify that the Young woman denied giving appellant any ill gotten gains, but was paying appellant the modest sum of a dollar a day for her room and that she had been there only two days.

Inspector Farrelly testified to absolutely nothing that proves the charges against appellant. He was asked at the hearing (Exhibit A, p. 15):

"Q. There was a girl in the place?
A. Yes, I saw one girl there.
Q. Her name was Marcelle Young?
A. Yes.
Q. Did you ever have any conversation with this girl about committing an act of prostitution?
A. No."

Both inspectors admitted that appellant did not offer to commit an act of prostitution with them. Neither inspector testified that appellant's place had a reputation as a house of prostitution, music or dance hall or other place of amusement where prostitutes gathered. On the other hand, the appellant positively testified that the place was not a house of prostitution.

It is significant that a statement was not taken from the Young woman, the alleged prostitute, by the

inspectors or she produced at the hearing. The inspectors apparently felt that she could not serve their purpose and that it would be better to leave the matter of making statements and giving testimony in their hands. This omission on their part and their subsequent failure to establish, or attempt to establish, by oral testimony, the charges, is fatal to their case because the burden of proof in a deportation proceeding rests with the Government.

Hughes v. Tropello, 296 Fed. 306;
U. S. v. Tod, 263 U. S. 149;
68 L. Ed. 221;
U. S. v. Louise Lee, 184 Fed 651;
U. S. v. Hung Chang, 126 Fed. 400.

II. THAT THE PROCEEDINGS BEFORE THE IMMIGRATION AUTHORITIES WERE MANIFESTLY UNFAIR AND THAT THERE WAS A MANIFEST ABUSE OF THE AUTHORITY COMMITTED TO THEM BY LAW.

(1) The warrant (Exhibit A, p. 23) gives as basis for the arrest of appellant: "She has been found in the United States in violation of the Immigration Act of Ferbuary 5, 1917, for the following *among other* (italics ours) reasons: That she has been found managing a house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes." In other words, it would appear that there were "other reasons" (which were not disclosed to appellant) for her arrest and trial besides those assigned by the warrant. This is positive proof of unfairness and misuse of authority.

The evident purpose of including "among other reasons" in the warrant was to make it so broad that regardless of what developed at the hearing or otherwise, if it served the immigration authorities, it could be used against the appellant. Although appellant was not specifically charged with what she may have done in Alaska, nevertheless the presiding inspector in his summary of the hearing at San Francisco felt that the "among other reasons" clause of the warrant justified him in basing his recommendation for deportation in part, at least, on the alleged admission of the appellant that she had "sported" in Alaska. It will be noted that the examining inspector's summary states (Exhibit A, p. 11): "A sworn statement was taken from the alien in which she admitted she had practiced prostitution in Alaska." Similarly the Washington Board of Review, under this "other reasons" clause, based its recommendation for deportation in part on this alleged admission of appellant. The Board's opinion in this regard reads (Exhibit A, p. 20): "The alien admitted in the preliminary statement having practised prostitution in Alaska for a few months some years ago."

In both of these instances it was deemed necessary to include in the findings specific reference to this alleged admission of appellant in order to justify the respective recommendations for deportation. This alleged admission was foreign to the issue unless it may be deemed that the "other reasons" clause gave justification to use appellant's alleged admission as a supporting basis for the respective recommendations for deportation.

In other words, the appellant was ostensibly tried on the specific charges in the warrant, but that the findings for her deportation were based in part upon matter that was foreign and extraneous to the issue.

It is fundamental that an alien can only be ordered deported on a specific charge against him.

Ex parte Nogata, 11 Fed. (2d) 178;

Ex parte Thorvumulopalo v. U. S., 3 Fed. (2d) 803.

In *Whitfield v. Hanges,* supra, 222 Fed. 745, at page 749, the court says:

> "The accused shall be notified of the nature of the charge against him in time to meet it * * * that the decision shall be governed by and based upon the evidence at the hearing and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it."

In *Ex parte Keisuki Sata,* 215 Fed. 173, at page 177, the court says:

> "It is quite true that an alien arrested on one charge may be deported for any reason which may develop in the course of the proceedings, but before this can be done he must be advised of the new charge or charges, and be given an opportunity to meet them."

The court, in this last cited case, further on in its opinion at page 177 gives the reason for this rule that an alien may not be tried on one charge and deported on another, saying:

> "So that he may not be lulled into a fancied security that he is being examined on one charge when it is really intended to order his deportation upon another."

For the immigration authorities to have legally used appellant's alleged admission of what she had done in Alaska some thirteen years ago it would have been necessary for them to have amended the warrant so as to make it one of the specific charges against the alien. Not having done this, the appellant, of course, had no grounds to assume that this matter would be used as one of the reasons for finding against her.

(2) At the hearing the presiding inspector introduced into the record a letter signed by inspectors Phelan and Farrelly on February 26th, 1927, together with a statement taken from appellant on the same date (Exhibit A, p. 16), whereas the record now discloses papers of similar import, but bearing different date, to-wit, the letter of inspectors in the record bears the date of February 25th (Exhibit A, p. 5) and the statement alleged to have been taken from the appellant (Exhibit A, p. 4) is shown by the statement of the record to have been taken on February 25th. While appellant does not desire to stress this particular point, the record clearly shows that in addition to the examining inspector specifying February 26th on which the letter was written and the statement made, that the appellant testified that she made her statement on February 26th, 1927 (Exhibit A, p. 16). It is true that appellant's attorney did refer to the letter being written and a statement being made on February 25th, but the only evidence of probative force in reference to the matter is that February 26th, 1927, is the correct date for both papers. Hence

legally neither of these papers have any place in the record under the authority of

Kwock Jan Fat v. White, 253 U. S. 454; and
Ex parte Avakian, 188 Fed. 688.

(3) The examining inspector evidently felt it necessary in setting forth the basis for his recommendation for deportation (Exhibit A, p. 11) to use the alleged admission that appellant had "sported" in Alaska. It is submitted that this matter not having been made by the warrant a charge against appellant, and therefore not within the issues, should not have been used and that using it was unfair and a manifest abuse of authority.

(4) The Washington Board of Review in its recommendation (Exhibit A, p. 20) for deportation likewise deemed it necessary to use the alleged admission of appellant that she had "sported" in Alaska, which, as heretofore pointed out, was not within the issues; therefore, the use of it in the opinion supporting deportation was unfair and a clear abuse of authority. Furthermore, the Board in its opinion (Exhibit A, p. 20) made a false finding that "the alien admitted in the preliminary statement * * * that at the time of her arrest in the proceedings she had a girl practicing prostitution in her house". There is no such admission by the appellant to be found anywhere in the record and to make such an untruthful finding was unfair and abusive of authority. It is elementary that a judicial or quasi judicial officer shall not base an opinion or decision upon matter that is not within the issue, and particularly that he shall not

make a decision based on an untrue finding. This was clearly done by the Board of Review in this case.

As the court said in *Whitfield v. Hanges,* 222 Fed. 745, at page 749:

> "The decision shall be governed by and based upon the evidence at the hearing, and that only."

CONCLUSION.

It is submitted that the appellant did not have a fair hearing because there is no substantial legal evidence in the record to sustain the charges against her and further that the proceedings were manifestly unfair and that there was a manifest abuse of authority committed to the immigration authorities.

While counsel for appellant believes that the contentions made are amply supported, nevertheless it is desired that the court also consider the serious consequences to appellant if she is deported to Italy, which country she has been away from for more than twenty-five years. She has one daughter and grandchild and relatives in the United States and all of her interests are here. Having lost her residence in Canada by having resided here since 1919, she cannot be deported to British Columbia, where one of her daughters resides. Italy, the country which the order of deportation directs that she be deported to, is indeed a foreign country to her, on account of her long absence therefrom.

As Judge Dietrich of this Circuit has said in *Ex parte Garcia,* 205 Fed. 56-57:

> "I am frank to say that in a case of this kind, where the petitioner has been domiciled in this country for more than a decade, and may have acquired large property interests and formed close social ties, and where, therefore, deportation is fraught with such dire consequence to him, to subject his right to remain here to a trial by ex parte affidavits is so far out of harmony with the procedure which I think ought to prevail that I would be inclined upon slight evidence of bad faith on the part of the administrative officers, to grant relief."

It is finally submitted that appellant is entitled to a release or at least is entitled to have the issues of this case tried *de novo* as outlined in *Whitfield v. Hanges,* 222 Fed. 754.

Dated, San Francisco,
June 16, 1928.

Respectfully submitted,

JULIAN D. BREWER,
Attorney for Appellant.

No. 5495

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

TERESA CASELLA,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,

Appellee.

BRIEF FOR APPELLEE

GEORGE M. NAUS,
Assistant United States Attorney.

GEORGE J. HATFIELD,
United States Attorney.

Nau, Stratford & Kerr, S. F

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Appellee.

BRIEF FOR APPELLEE

MAY IT PLEASE THE COURT:

The ruling of the District Court, sustaining our demurrer and refusing to issue the writ, was right, because:

(a) **THE PETITION FOR THE WRIT WAS NOT SIGNED BY THE ALIEN, NOR DOES IT APPEAR THAT SHE AUTHORIZED THE PETITION.**

By R. S. 754 (28 U. S. C. 454) it is required that "application for writ of habeas corpus shall be made * * * by complaint in writing, signed by the person for whose relief it is intended * * *." The

petition here was not signed by Teresa Casella, but by "Mrs. Mary E. Fuella (J. D. B.)," as appears at T. 12. The petition says, in paragraph I,

> "That your petitioner is the daughter of Teresa Casella, the detained above named, and makes this petition for and as the act of her said mother because her detention, as hereinafter set forth, makes it impossible for her to verify this petition on her own behalf." (T. 3.)

But the same section (R. S. 754) provides that the application shall be by complaint "setting forth the *facts* concerning the detention of the party restrained," and all the books declare that facts, as distinguished from conclusions, must be alleged (Loh Wah Suey v. Backus, 225 U. S. 460; Cronin v. Ennis, 11 F. (2d) 237, and cases at 239); "such general averments of legal conclusions, without the slightest indication of the facts on which they are predicated, have been held by the Supreme Court insufficient to support a writ of habeas corpus" (U. S. v. Williams, 204 F. 844, 846); "it was indispensable to the efficacy of these conclusions of law in this pleading that the essential facts which were conditions precedent to the deduction of these conclusions, if there were any such facts, should be set forth in the petition so that the court could perceive whether or not they warranted these conclusions, and this was not done" (Quagon v. Biddle, 5 F. (2d) 608, 609). Not a single fact is alleged here why the detention of Teresa Casella made it impossible for her to sign the petition. *Non constat* whether the Commissioner of Immigration would have promptly and courteously permitted access to her to obtain her signature, if she desired to sign.

Moreover, the petition fails, even in its legal conclusions, to declare that her *signature* could not be obtained; it speaks only of an impossibility "for her to *verify* this petition." The statute does not require verification by her, but only her *signature;* verification may be by another (R. S. 754). The requirement of her signature is not a mere formality, but is derived from a common law principle:

> "A mere stranger has no right to come to the court and ask that a party who makes no affidavit, and who is not suggested to be so coerced as to be incapable of making one, may be brought up by habeas to be discharged from restraint. For anything that appears, Captain Child may be very well content to remain where he is. The rule must be discharged."
>
> Ex p. Child, 15 C. B. 238; 139 English Reprint 413.

Compare Ex parte Dorr, 3 How. 103, 11 L. Ed. 514.

(b) THE PETITION WAS FATALLY DEFECTIVE BECAUSE IT CHARGED, ON "INFORMATION AND BELIEF," ESSENTIAL FACTS WHICH, IF TRUE, WERE PECULIARLY WITHIN THE KNOWLEDGE OF THE ALIEN, AND EVASION OF POSITIVE ALLEGATIONS CANNOT BE JUSTIFIED BY THE FLIMSY DEVICE OF SUBSTITUTING ANOTHER PERSON AS PETITIONER FOR THE WRIT.

Paragraph VI of the petition (T. 5) reads:

> "Upon *information and belief* your petitioner's said mother, Teresa Casella, the detained, was not guilty of nor was not found 'managing a house of prostitution, or music or dance hall or other place of amusement or resort habitually frequented by prostitutes.' "

It was necessary to allege the alien's innocence of the ground of deportation, to give substance to the claim

of unfairness of hearing, to show that justice had miscarried, to show that the writ was not sought upon barren, dry, technical slips. Paragraph VI evasively seeks to make that showing. We say, "evasively," because Teresa Casella knew better than any one else whether she had "managed a house of prostitution," etc.; in the language of the books, those facts were "peculiarly within her knowledge." Such facts *must* be alleged positively by a plaintiff, and allegations on "information and belief" are *fatally* defective (Hall v. James, 79 Cal. App. 433; 249 Pac. 877); as pointed out in the case just cited, allegations on "information and belief" are permitted only as to "matters which are peculiarly within the knowledge of the *opposite* party and which the pleader can learn only from statements made by him to others." The evasiveness of paragraph VI cumulates with and points and emphasizes the evasion of the requirement that the alien must *sign* the petition. The petition must, as a matter of law, be read as though Paragraph VI was not in it, and thus read must fall before the general demurrer.

(c) WHILE A HABEAS CORPUS IS A PRIVILEGED WRIT OF FREEDOM, IT MUST NOT BE PUT TO AN ABUSIVE USE; AND THE DISCRETION OF THE DISTRICT COURT WAS WELL EXERCISED IN REFUSING THE WRIT, BECAUSE PARAGRAPH IX OF THE PETITION SHOWED A PRIOR REFUSAL ON A LIKE APPLICATION.

Paragraph IX of the petition reads (T. 10-11):

> "That on October 14th, 1927, your petitioner filed a petition for writ of habeas corpus in behalf of her mother and that on said day the above-entitled court made an order to show cause in

> relation thereto. That thereafter the United States District Attorney interposed a demurrer to said petition and that on December 3d, 1927, the demurrer was sustained and your petitioner's petition dismissed and the detained was ordered surrendered. That the aforesaid petition filed on October 14th, 1927, was drawn by counsel representing your petitioner, who did not have a copy of the record of the proceedings before the immigration authorities in reference to your petitioner's mother, Teresa Casella, as hereinabove set forth and that therefore your petitioner's former attorney was incapable of presenting a petition accurately setting forth the grounds why the writ should be issued. The within writ is accompanied by the record in the proceedings and contains different and additional grounds why your petitioner believes the writ should be issued as prayed herein."

That paragraph abounds in conclusions, and in so far as any facts may be gleaned therefrom upon which to predicate conclusions, the conclusions drawn by the pleader are erroneous. If the lawyer who drafted the earlier application "did not have a copy of the record," the present application is silent concerning whether, he, or any one, made any effort to obtain it; whether, on the earlier application, he sought an ancillary certiorari to bring in the record in aid of the application for a habeas corpus (29 C. J. 196, sect. 232); or any other appropriate remedy (Ex parte Jew You On, 16 F. (2d) 153, 154, col. 2). Paragraph IX is evasively insufficient, contains no allegation upon which perjury can be assigned (Ex parte Yabucanin, 199 F. 366; Ex parte Walpole, 84 Cal. 584), and on its face shows that the earlier application was dismissed on December 3, 1927 (T. 11), followed by

the filing of the present application on January 6, 1928 (T. 13), evidencing two "phases of a protracted resistance" (Salinger v. Loisel, 265 U. S. 224, 225), and a last-minute "rush order and injunction on the eve of deportation" (Ex parte Jew You On, supra). The effect of Paragraph IX was to lodge the second application in the "sound judicial discretion" of the District Court, "guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought," and "among the matters which may be considered and even given *controlling weight* are a prior refusal to discharge on a like application." We quote from Salinger v. Loisel, supra (265 U. S., at 231):

> "The federal statute (sec. 761, Rev. Stats.) does not lay down any specific rule on the subject, but directs the court 'to dispose of the party as law and justice may require.' A study of the cases will show that this has been construed as meaning that each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and (b) a prior refusal to discharge on a like application."

The present application is so plainly devoid of merit, and the appeal so frivolous, that we ask the Court to impose costs for a frivolous appeal, and suggest $250.00, the amount of the cost bond on appeal (T. 20). (This Court has before it at this term two attempts, by successive applications for habeas corpus,

to obtain last-minute delay of deportation, the other case being Caranica v. Nagle, No. 5569).

(d) THE MAIN CHARGE OF THE PETITION IS FOUND IN PARAGRAPH VII, AND IS MADE WHOLLY ON "INFORMATION AND BELIEF," AND IS THEREFORE FATALLY DEFECTIVE.

The whole of paragraph VII (T. 5) is predicated upon "information and belief"; it runs:

> "Upon *information and belief* the said order of deportation of your petitioner's said mother from the United States to Italy is illegal and contrary to law for the following reasons, to-wit:" (Here follows, "First:" unfair hearing; "Second:" insufficiency of evidence; "Third:" what?).

A plaintiff may not allege on "information and belief" facts within, or presumably within, her personal *knowledge* (Hall v. James, supra, and authorities there cited). The petition "annexed a copy of the record of the hearing accorded the detained by the immigration authorities" (T. 5), and the charge of paragraph VII relates wholly to matters, 1, within that record, and 2, occurring in the alien's presence. The charging part of the petition is therefore fatally defective.

Next, passing to the points made by appellant, we reverse the order in which she makes them (1, insufficiency of evidence, and 2, unfairness of hearing), because the Supreme Court has squarely laid it down that the former point is not open to inquiry, if open to inquiry at all, unless the latter point is made good (Chin Yow v. U. S., 208 U. S. 8); and we say that

(e) THE HEARING WAS FAIR.

Assuming, without conceding, that probable cause for the writ can be shown by a charge on information and belief, nevertheless, the matter of paragraph VII does not show probable cause. The charge of "unfairness" is based upon a quibble over an inadvertence in speaking of the date of *one* statement as "February 25th," instead of "February 26th." Postulating *two* statements therefrom, the alien proceeds to magnify the molehill of clerical misprision into a mountain of Unfairness, and sprinkles such epithets and high-sound characterizations as, "illegal," "contrary to law," "manifestly unfair," "manifest abuse," "violation of rights," "greatly prejudiced," and "not accorded a fair hearing," through the charge. But,

> "Since the court had jurisdiction of the parties and of the subject-matter, it is hornbook law that, however wrong the result of the proceeding may be, missteps occurring in the course of it constitute irregularities and errors in procedure only, and they cannot be conjured into anything graver by the use of impressive and high-sounding characterizations."

Briggs v. Hanson, 86 Kan. 632; 121 Pac. 1094; Ann. Cas. 1913C, 242; 52 L. R. A. (N. S.) 1161, at 1164, col. 1;

Gray v. Hall, 75 Cal. Dec. 236; 265 Pac. 246.

The immigration record shows that only *one* statement was taken from the alien (at Sacramento). This statement appears at page 4 of the record (Exhibit A). At the heading this statement bears the date "Feb. 26, 1927" which is shown to be the date that the notes of one of the investigating officers were dictated

to a stenographer at San Francisco and transcribed by the stenographer. The heading also reads "Statement taken at Chico Rooms, Sacramento, Calif., Feb. 25, 1927". In introducing this statement into the record and offering it to the alien to read at the hearing it was referred to by the Examining Inspector as "statement taken from the alien February 26, 1927," he obviously having taken the *date of transcription* appearing in the upper right-hand corner of the statement.

The same contention is made regarding report of the investigating Inspectors, Phelan and Farrelly, which is dated Feb. 25, 1927, and which was, apparently through inadvertence, referred to at the hearing as report dated February 26, 1927. This report appears at page 5 of the immigration record (Exhibit A).

The report of hearing accorded the alien April 20th, 1927, by Inspector T. E. Borden, at which the alien was represented by Attorney Russell, clearly shows that the statement and report appearing at pages 4 and 5 of the immigration record respectively, are those which were then formally introduced and offered to the alien and her attorney for their inspection and that the Examining Inspector's error in referring to the dates thereof was inadvertent. It will be observed that Attorney Russell when referring in his cross-examinaion of the alien and of the investigation officers, Phelan and Farrelly, to the investigation made by these officers, everywhere uses the date "February 25, 1927". (Exhibit A, p. 16-15-14.) Cer-

tainly if he had not been questioning the witnesses upon the basis of the statement taken and report rendered February 25, 1927, which are in the record but upon an alleged statement and report made February 26, 1927, he would not in every instance—four times in all—in the course of his questioning have used the date "February 25, 1927". None of his questions contained any reference to the date February 26th, 1927. In addition it is shown on page 15 of the immigration record that Attorney Russell in his cross-examination of Inspector Farrelly quoted the first question and answer appearing in the statement which is at page 4, and comments upon it having been a transcription of notes of Inspector Phelan as dictated to Stenographer Robert J. Cassidy, whose signature appears at the foot of said statement.

Not only do we say, *de minimus non curat lex,* but we further say that this tempest about a mistake in dates is so plainly sham and frivolous as to amount to impertinence and to trifling with this honorable Court, and well deserves a taxation of costs (the cost bond is in the sum of $250.00) for a frivolous and dilatory appeal. Certainly, effective discouragement should meet abuse of the writ, through successive applications and frivolous claims.

No refuge can be found by the alien in the additional assertion of unfairness, arising from the charge of the warrant of arrest. Objections to the sufficiency of the warrant of *arrest* do not oust jurisdiction, if it appears on a fair hearing that the alien is subject to deportation (C. C. A. 9, Chun Shee v. Nagle, 9 F.

(2d) 342, 343, col. 1, and cases there cited). The petition here, stuffed with evasions as it is, nowhere says that the alien was ignorant of what she was being tried for, nor that she ever asked to reopen the hearing to offer proof against the deportation findings.

We have considered the charges of unfairness, and have shown that the hearing was fair; hence,

(f) THE HEARING HAVING BEEN FAIR, THE JUDICIAL INQUIRY CAN PROCEED NO FURTHER.

This proposition is true, even though the writ is sought by one who claims natural born citizenship (Chin Yow v. U. S., 208 U. S. 8); *a fortiori,* it is true in the case of an admitted alien. As said in Chin Yow's case (208 U. S., at 11):

> "Of course if the writ is granted the first issue to be tried is the truth of the allegations last mentioned [unfair hearing]. If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not."

But, assuming for the argument that the Judiciary may look behind the Executive order of deportation into the evidence upon which it is based, we say that

(g) THE EVIDENCE WAS SUFFICIENT.

The sufficiency of relevant, competent and material evidence is not abated by the addition of irrelevant,

incompetent or immaterial matter (C. C. A. 9, Chin Shee v. White, 273 F. 801); hence, appellant's argument, based upon a claim relating to "an ex parte unsworn statement" is without force. Moreover, Inspectors Phelan and Farrelly, who signed that statement, were produced as witnesses at the hearing and cross-examined by the attorney for the alien (Imazo Itow v. Nagle, 24 F. (2d) 526); an audacious admission of that circumstance is to be found at pages 11 and 12 of appellant's brief.

The evidence was sufficient. It appers from the testimony of Inspectors Phelan and Farrelly given when they were produced at the hearing for cross-examination by the attorney for the alien, that they testified to the same facts related in their report which is at page 5 of the record; viz: that on February 25, 1927, they went to the Chico Rooms at Sacramento, were there solicited by the alien for an act of prostitution, that the alien called in a girl named Marcelle Young, who took one of the officers to another room and named her price for an act of prostitution. From memorandum of the Washington Board of Review (Ex. A, p. 20) it is shown that this oral testimony given by the officers at the hearing at which the alien was represented by counsel constituted the principal evidence upon which the warrant of deportation was based, and we submit that this oral testimony was of itself sufficient to sustain the charge contained in the warrant of deportation. We quote from

Leffer v. Nagle, 22 F. (2d) 800,

decided by this Court:

> "Her conduct, as related by the two officers, is ample to justify the order of deportation. True, a single act of illicit sexual intercourse does not necessarily constitute prostitution, but the solicitation to such an act may be made in such manner and under such circumstances as to constitute the most convincing evidence of an habitual practice."

And, surely, if not "the most convincing evidence," it is at least of enough substance in the present case to fairly support the Executive's finding. The testimony narrated at page 11 of appellant's brief is alone sufficient to support the finding. Counsel stresses the fact that there is no evidence showing that appellant received any of the earnings of the woman Marcelle Young. The charge is not that she received the earnings of a prostitute, or that she is a prostitute herself, but merely that she "has been found managing a house of prostitution, or music or dance hall or other place of amusement or resort habitually frequented by prostitutes." In Itsusaburo Mita v. Bonham, 25 F. (2d) 11, this Court said:

> "The fact that he did not share directly in the earnings is after all only a probative circumstance, possibly neutralized by the consideration that he may have thought the presence of a 'girl' in his house would measurably popularize his rooms."

The finding is supported *independently* of the alien's admission that she had "sported in Alaska," concerning which appellant says so much. We therefore need not consider what question, if any, would be open

to this Court if that admission were the sole support of the finding.

The judgment should be affirmed.

Respectfully submitted,

GEORGE M. NAUS,
Assistant United States Attorney.

GEORGE J. HATFIELD,
United States Attorney.

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No. 5495

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TERESA CASELLA,
Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,
Appellee.

REPLY BRIEF FOR APPELLANT.

JULIAN D. BREWER,
Chancery Building, San Francisco,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

No. 5495

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TERESA CASELLA,
Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,
Appellee.

REPLY BRIEF FOR APPELLANT.

May it Please the Court:

Respondent in his reply brief has left utterly unchallenged all of the 14 cases cited by appellant in her brief supporting her legal contentions. Not one of appellant's 14 cases are mentioned by respondent, much less answered, distinguished or refuted. Respondent has sought to accomplish his purpose by injecting into the case and stressing certain technical points as to legal form which it is submitted are inconsequential and not applicable to this case.

(a) A PETITION FOR A WRIT OF HABEAS CORPUS SIGNED BY ALIEN'S DAUGHTER AND BY THE ALIEN'S ATTORNEY AS SUCH, WHERE THE ALIEN IS IN CUSTODY MEETS THE REQUIREMENTS OF LAW.

It is apparent that respondent has overlooked the fact that appellant's attorney, as such, signed the petition for writ at the end thereof as follows: "Julian D. Brewer, attorney for petitioner and detained herein". (T. 12.)

Appellant's position with regard to this point is amply supported by leading cases.

In *U. S. v. Watchorn,* (C. C. N. Y.) 164 Fed. 152 at page 153, the court in reference to this point said:

> "Notwithstanding the language of Section 754 (R. S.) it has been the frequent practice in this district to present habeas corpus petitions in deportation cases *signed* and verified by others than the persons detained."

In further reference to this situation this court, in *U. S. ex rel. Bryant v. Huston,* (C. C. N. Y.) 273 Fed. 915, said:

> "The practice of a next friend applying for a writ is ancient and fully accepted. There are many instances and circumstances under which it may not be possible nor feasible that the detained person shall sign and verify the complaint * * * impossibility of access to the person, or mental incapacity are all illustrations of a proper use of the 'next friend' application."

Appellant's position that an application for writ may be made by one person on behalf of another under circumstances similar to those herein is further supported by the following authorities:

In re Hoyle, (D. C. Cal.) 1 Cr. Law Mag. 472; 12 Fed. Cas. No. 6803;

In re Ferrens, (D. C. N. Y.) Fed. Cas. No. 4746;

Ex parte Dostal, 243 Fed. 664.

Under the common law which is controlling, appellant's position in regard to this point is secure.

In *Rex v. Ashby,* 14 How. St. Tr. 814, the House of Lords in England in 1704, resolved

> "that every Englishman who is imprisoned by any authority whatever has an undoubted right, by his agents or friends, to apply for and obtain a writ of habeas corpus, in order to procure his liberty by due process of law."

In this case, where the appellant's attorney and her daughter signed and verified the petition it cannot be successfully claimed that strangers presented it. Therefore *Ex parte Child,* 15 C. B. 238, and *Ex parte Dorr,* 3 How. 103, cited by respondent are not in point.

Further, the respondent in his reply brief questions for the first time the authority of appellant's attorney and daughter to sign the petition. The general demurrer (T. pp. 14 and 15) made by respondent does not interpose or mention this ground. Neither did appellant's memorandum of points and authorities submitted to the lower court at the hearing and on file below discuss or even mention this point, nor was it mentioned at the hearing by appellant. The point is simply eleventh hour interposition by respondent relating to form only and is without merit.

(b) THE PETITION WAS DEFECTIVE BECAUSE IT ALLEGED FACTS "ON INFORMATION OR BELIEF" WHERE MADE UNDER THE "NEXT FRIEND" PRIVILEGE AND WHERE A COMPLETE COPY OF THE RECORD OF THE IMMIGRATION PROCEEDINGS WAS ANNEXED TO THE PETITION.

Having established that another may apply for a writ under R. S. 754 as interpreted by the courts, in behalf of one detained, it conclusively follows that the application thereunder may be made on "information and belief" and a petition thereon serves the legal purpose of the petition, which is to put the matters in controversy or which are opposed in issue so that a hearing may be had by the court on the merits. The facts surrounding the instant case were not within the personal knowledge of appellant's daughter but she, after studying the record of the immigration authorities in reference thereto, was able to present the petition on "information and belief", the most that she could have possibly done under the circumstances. Granting that if appellant had not been incarcerated she would have been required by law to have made the allegations therein positively because within her personal knowledge, it is submitted that this rule does not apply where another, with no personal knowledge about the matter, makes the petition under the next friend privilege from information gathered from outside sources.

In the instant case the daughter went to a great deal of trouble to secure from the immigration authorities a certified copy of the record, attaching the same to her petition for writ, to make clear to the court the exact basis for her allegations therein made on "information and belief".

Respondent's case of *Hall v. James,* 79 Cal. App. 433, has no application here. In that case, involving a claim by plaintiff for damages for breach of a motion picture contract, the plaintiff alleged on information and belief that he had sustained certain damages. The court held that plaintiff being in the best position to know what the extent of the damages were, could not allege them on "information and belief", and accordingly sustained a *special* demurrer directed to this point. The instant case presents an entirely different situation because (1) here there was no specific demurrer directed to this point (T. pp. 14 and 15) nor even mentioned by respondent in his memorandum of points and authorities on file in the District Court, nor in his argument when he submitted them during the hearing of this matter in the lower court; and (2) the petition for writ here was signed by another, on account of appellant being incarcerated, in behalf of detained, which petitioner had no personal knowledge of the matter and had to obtain from the best available outside source the facts she alleged on information and belief. This further point mentioned in his reply brief for the first time is simply another eleventh hour interposition by respondent relating to form only and is without merit.

(c) THE PETITION FOR WRIT IN THE INSTANT CASE IS NOT "LIKE" THE APPLICATION PRESENTED IN THE FORMER CASE WHICH WAS REFUSED.

Before the honorable lower court signed the order to show cause herein (T. p. 13) he read both the

former petition (U. S. District Court in and for the Northern District of California, Second Division, No. 19,466) and the petition on file herein. It is submitted that the honorable lower court would not have signed the order to show cause in the instant case if the petition therein had been "like" the one presented in the former case.

The facts in reference to this matter are: The former petition was not prepared by Clifford Russell, Esq., who represented appellant before the immigration authorities and who has his office in Sacramento, California, but was prepared by Stephen M. White, Esq., with offices at San Francisco, California, at the request of appellant's said daughter, the latter attorney being retained by her for this purpose on account of him having his office in this city within easy proximity of the court. Said attorney who prepared the first petition being pressed for time and not having available a copy of the record of the proceedings before the immigration authorities, and appellant's said daughter, not being able to make clear to said attorney the basis on which appellant had been ordered deported, alleged grounds in the former petition which were not within the issues whatever, to wit, he alleged, in the absence of accurate knowledge of the facts:

> "First: That there is no evidence to sustain the action of the said Secretary of Labor in his finding that the detained had knowingly shared or received anything or benefit or value from any prostitute and that there is not sufficient or any evidence to support the findings of the said secretary. Second: Your petitioner so alleges upon

> her information and belief that the deportation of the said detained to Canada is illegal and unwarranted in this that the said detained is a subject of Canada * * * (So. Div. U. S. District Court, Second Division, No. 19,466)."

The actual facts were that appellant was ordered deported to Italy on an entirely different charge, to wit, "that she has been found managing a house of prostitution or music or dance hall, or other place of amusement or resort habitually frequented by prostitutes". (Ex. A, p. 23.) The petition presented in the instant case (T. p. 3) alleged entirely different facts in reference to the actual charge, which the first petition did not do, as pointed out. Therefore the claim of respondent in his reply brief that "the discretion of the District Court was well exercised in refusing the writ, because paragraph 9 of the petition showed a prior refusal on a like application" is erroneous. It is respectfully submitted under the facts that the claim by respondent that the two petitions were alike, when he knew from personal knowledge that they were based upon entirely different grounds, is trifling with this honorable court. Having shown that the two petitions were not alike, the cases cited by respondent on this erroneous claim have no applicability.

We have considered the effect of allegations in a petition for writ of habeas corpus made on "information and belief" and have shown that the petition is not, by reason of such allegations, fatally defective as claimed under respondent's caption (d) in his reply brief. We have already discussed (*Hall v. James,*

supra) showing that this case is not applicable. Further it is submitted that *Chin Yow v. U. S.,* 208 U. S. 8, cited by respondent is likewise not applicable.

As to the captions in respondent's brief "(e) The Hearing Was Fair" and "(f) The Hearing Having Been Fair etc.", appellant submits that it is not incumbent on her to answer these, as the respondent has not mentioned, much less answered, any of the cases cited by appellant with specific reference to these points and that the cases cited under said captions by respondent are not applicable. The case of *Leffer v. Nagle,* 22 Fed. (2d) 800, cited by respondent, is distinguished from the instant case by (1) the fact that the Leffer place had a general reputation as being a house of prostitution and that it was this reputation which caused the immigration authorities to inspect the same, and (2) when the Leffer woman was questioned by the immigration officers after her arrest she admitted that she had practiced prostitution on the premises for a period of six months. In the instant case the agents testified (Ex. A, pp. 15 and 16) that they had no information prior to going to the premises that such an act was ever at any time committed on appellant's premises; further, appellant positively testified (Ex. A, pp. 14 and 15) that her lodging house was not a house of prostitution. Further, the unfairness shown with reference to the present case did not apply to the *Leffer* case where the appellant attempted to change her testimony.

CONCLUSION.

Therefore, because respondent in his reply brief has injected into the case and stressed certain technical points as to legal form which are inconsequential and inapplicable, has not answered a single case cited by appellant, and because respondent has not attempted to meet the proof pointed out in appellant's brief that the Washington Board of Review made the false finding to wit (Ex. A, p. 20): "the alien admitted in the preliminary statement * * * that at the time of her arrest in the proceedings she had a girl practicing prostitution in her house, the relief should be granted appellant as prayed for in her brief.

Dated, San Francisco,
October 27, 1928.

Respectfully submitted,
JULIAN D. BREWER,
Attorney for Appellant.

No. 5496

United States

Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL SURETY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5496

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NATIONAL SURETY COMPANY, a Corporation,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

Messrs. CALDWELL & LYCETTE, Attorneys for Appellant,
1311 Alaska Building, Seattle, Washington.

THOS. P. REVELLE, Esquire, Attorney for Appellee,
310 Federal Building, Seattle, Washington.

PAUL D. COLES, Esquire, Attorney for Appellee,
305 Federal Building, Seattle, Washington. [1*]

United States District Court, Western District of Washington, Northern Division.

No. 8524.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES H. UNVERZAGT,
Defendant.

WRIT OF SCIRE FACIAS.

President of the United States of America, to the Marshal of the Western District of Washington:

WHEREAS, heretofore, to wit, on the ninth day of May, 1924, a bail bond and recognizance in the

*Page-number appearing at the foot of page of original certified Transcript of Record.

sum of Ten Thousand Dollars ($10,000.00) was executed by the defendant Charles H. Unverzagt, as principal, and National Surety Company, as surety, which said bail bond and recognizance was conditioned for the appearance of the said defendant before the United States District Court for the Western District of Washington, Northern Division, at the courthouse in the City of Seattle, and from time to time and term to term thereafter, to abide by and obey a judgment and order of this Court previously entered against said defendant, discharging a writ of habeas corpus and ordering his removal to the United States District Court for the Western District of New York, and that thereafter, on the ninth day of May, 1924, the said bail bond and recognizance was filed in said court with the Clerk thereof.

AND WHEREAS, thereafter, to wit, on the 13th day of May, 1925, and at a proper term of said court, the said defendant being called to come into *to* court to answer, abide by and obey the order previously entered which had been appealed from and affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, came not, but made default, whereupon, on motion of the United States District Attorney, it was considered by the Court that for the default aforesaid, the said defendant Charles [2] H. Unverzagt, as principal, and National Surety Company, as surety, forfeit and pay to the United States of America the sum of Ten Thousand Dollars ($10,000.00) according to the tenor and effect of said recognizance and

property bond now in the hands of the Clerk of said court, unless they appear and show sufficient cause to the contrary.

YOU ARE, THEREFORE, HEREBY COMMANDED, to make known the contents of this writ to the said Charles H. Unverzagt and National Surety Company, and summon them to appear before said District Court of the United States, at a court to be held before the Western District of Washington, Northern Division, at the courthouse in Seattle on the 22d day of June, 1925, and to show cause, if any they have, why judgment *nisi* aforesaid should not be made absolute; and further, to show cause why they ought not to have execution issue against them for the amount due to the United States of America, upon said property bond, under the judgment aforesaid, together with any costs which may accrue by reason of proceedings to be had in the enforcement of said judgment, as by law provided.

HEREIN FAIL NOT.

WITNESS, the Honorable JEREMIAH NETERER, Judge of the United States District Court, at Seattle, in said District, on the 29th day of May, 1925.

[Seal] ED M. LAKIN,
Clerk of the District Court of the United States,
Western District of Washington.

By S. M. H. Cook,
Deputy. [3]

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed writ of scire facias on the therein named National Surety Company by handing to and leaving a true and correct copy thereof with E. S. Turner, personally at Seattle, in said District on the 29th day of May, A. D. 1925.

E. B. BENN,
U. S. Marshal.
By A. B. Miller,
Deputy.

Western District of Washington,—ss.

I hereby certify and return, that on the 29th day of May, 1925, I received the within scire facias and that after diligent search, I am unable to find the within named defendant Charles H. Unverzagt within my district.

E. B. BENN,
United States Marshal.
By A. B. MILLER,
Deputy United States Marshal.

[Endorsed]: Filed Jun. 2, 1925. [4]

[Title of Court and Cause.]

AMENDED RETURN AND ANSWER TO WRIT OF SCIRE FACIAS.

Comes now the National Surety Company, surety

on the bond of the above-named defendant, and making further answer and return to the writ of scire facias heretofore issued herein, files this amended answer to said writ, and for an amended answer admits, denies and alleges as follows, to wit:

I.

Said surety admits that on May 9th, 1924, a bail bond in the sum of $10,000.00 was executed by said Chas. H. Unverzagt as principal and the National Surety Company as surety.

II.

Said surety denies that said bail bond was conditioned on the appearance of said Chas. H. Unverzagt in the aforesaid court from time to time and term to term to abide and obey the judgment and order of the aforesaid Court previously entered against him.

III.

Said surety denies that on May 13th, 1925, or at any other time, said Chas. H. Unverzagt was called to come in and obey an order previously entered against him; and denies that said surety or said Chas. H. Unverzagt made any default under said bond, whatsoever. [5]

For further answer to said writ of scire facias and as a first affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That Chas. H. Unverzagt was arrested at Blaine, Washington, on May 7, 1924, on a fugitive from justice warrant, based upon two indictments against

him in New York, and the affidavit of Deputy United States Marshal Knizek; that habeas corpus proceedings were instituted in the United States District Court for the Western District of Washington, Northern Division, to test the legality of said arrest; that during the pendency of said habeas corpus proceedings, and said Chas. Unverzagt was again arrested by a United States Marshal, which said second arrest was based upon one of the New York indictments upon which said Chas. H. Unverzagt had been originally arrested at Blaine, Washington; that habeas corpus proceedings were instituted to test the legality of said second arrest; that in said second habeas corpus proceedings the writ was ordered discharged; that an appeal from said order was taken to the United States Circuit Court of Appeals for the Ninth Circuit; that said Chas. H. Unverzagt was given his liberty pending said appeal, on a property bond in the sum of $10,000.00, in which said Chas. Unverzagt was principal and M. H. Casey and Agnes A. Pendleton were sureties; that said appeal was to test the legality of the arrest on one of the indictments said defendant had originally been arrested on, at Blaine, Washington; that said second arrest was on the same charge on which said Chas. H. Unverzagt was originally arrested; that said property bond superseded and took the place of the aforesaid bail bond previously executed by this surety. [6]

For further answer to said writ of scire facias, and as a second affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That the writ of scire facias issued herein summons said principal and surety to show cause, if any they have, why they ought not to have execution issue against them under said "property bond"; that the bond intended to be forfeited is the property bond signed by Chas. H. Unverzagt as principal, and M. H. Casey and Agnes A. Pendleton, as sureties; that said writ of scire facias should have been directed to said Chas. H. Unverzagt and said M. H. Casey and said Agnes A. Pendleton; that the writ issued against this surety was issued by mistake.

For further answer to said writ of scire facias, and as a third affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That at the time this surety executed a surety bond, with Chas. H. Unverzagt as principal and this surety as surety, the only order which had been issued, was an order dismissing the writ of habeas corpus; that particularly no order *or* removal had been issued; that said Chas. H. Unverzagt has never been ordered to do anything which he has not done; that said Chas. H. Unverzagt has not failed to obey any order which he was bound by said bond to obey.

For further answer to said writ of scire facias, and as a fourth affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That the order on which said writ of scire facias was issued alleges that said Chas. H. Unverzagt failed to abide by the judgments of the Court previously entered; that said [7] Chas. H. Unverzagt has not failed to abide by any order of the Court previously entered; that said order for a writ of scire facias is null and void, and of no effect whatsoever; that the writ based upon said order is null and void and of no effect whatsoever.

WHEREFORE having made its return to the writ of scire facias issued herein, and having fully answered the same, and having shown cause why the judgment *nisi* aforesaid should not be made absolute and why execution should not issue against the National Surety Company for the amount claimed in said writ of scire facias, the National Surety Company prays that judgment absolute be not rendered against it, and that it be relieved from any and all liability under said bond, and from any and all costs accruing thereunder and that said writ of scire facias be discharged.

JOHN F. DORE,
CALDWELL & LYCETTE,
Attorneys for National Surety Company.

United States of America,
Western District of Washington,
Northern Division,—ss.

John P. Lycette, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the National Surety Company, a corporation, and makes this verification for and on behalf of

said National Surety Company for the reason that it is a foreign corporation and that there is no officer thereof within the State of Washington upon whom service of process may be had; that he has read the foregoing return to writ of scire facias; knows the contents thereof and believes the same to be true.

JOHN P. LYCETTE.

Subscribed and sworn to before me this 22d day of March, 1927.

[Seal] B. A. NORTHROP,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Received a copy of the within ——— this 24 day of March, 1927.

THOS. P. REVELLE,
Attorney for ————.

[Endorsed]: Filed Mar. 24, 1927. [8]

[Title of Court and Cause.]

WAIVER OF JURY.

Comes now the National Surety Company, and waives any right it might have to a jury trial herein.

NATIONAL SURETY COMPANY.
By CALDWELL & LYCETTE,
Its Attorneys.

O. K.—PAUL D. COLES,
Asst. District Attorney.

[Endorsed]: Filed Jun. 13, 1927. [9]

United States District Court, Western District of Washington, Northern Division.

No. 8524.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES H. UNVERZAGT,

Defendant.

JUDGMENT.

It appearing to the Court from the records and files herein and from the evidence adduced that on the 11th day of May, 1925, the mandate of the Circuit Court of Appeals for this Circuit was entered, affirming the decision of the District Court, and directing that the defendant render himself amenable to the orders of the District Court; thereafter, on the 13th day of May, 1925, the above-named defendant Charles H. Unverzagt was duly called into this court to abide the orders of this court, and that when so called said defendant Charles H. Unverzagt defaulted and failed to appear, and that he was duly and regularly summoned from the door of said courtroom three times to appear and answer to said mandate, and again failed to appear, and that thereafter, to wit, on the 13th day of May, 1925, the appeal and supersedeas bond which was executed by the said defendant Charles H. Unverzagt, in the sum of Ten Thousand Dollars ($10,000.00), which said appeal and supersedeas

bond was conditioned that if the said defendant Charles H. Unverzagt shall diligently prosecute said writ of error, and shall render himself amenable to all orders which said Circuit Court of Appeals shall make in the premises, and to all process ordered to be issued by said Circuit Court of Appeals, and shall not leave the jurisdiction of this court without permission being first granted, and shall render himself amenable to any and all orders made or entered by the District Court of [10] the United States for the Western District of Washington, Northern Division, was upon motion of the United States Attorney, duly forfeited, and judgment *nisi* thereupon entered defaulting said appeal bond; that thereafter on the 29th day of May, 1925, a writ of scire facias was duly issued out of this court, commanding the said Charles H. Unverzagt, as principal, and the National Surety Company as surety, to appear before this court on the 22d day of June, 1925, to show cause why judgment *nisi* should not be made absolute, and further, to show cause why they ought not to have execution issue against them, and each of them, for the amount due to the United States of America upon said appeal bond, under the judgment as aforesaid, together with any costs which may accrue by reason of the proceedings to be had in the enforcement of said judgment as by law provided, and that the said defendant Charles H. Unverzagt could not be found, and that service was effected on the said National Surety Company, surety, and that said writ has been duly returned into this

court by the United States Marshal for said district, with his return thereon as aforesaid; and an answer to the said writ was regularly filed by the National Surety Company, and on the 25th day of May, 1927, the matter was regularly brought on for hearing before the undersigned, one of the Judges of the above-entitled court for the Western District of Washington, the United States of America appearing by Thomas P. Revelle, United States Attorney, and Paul D. Coles, Assistant United States Attorney, and the National Surety Company appearing by Hugh Caldwell and John P. Lycette, its attorneys; and said cause came on regularly for trial and evidence having been introduced and argument heard, and the Court being fully advised in the premises, it is by the Court,

ORDERED AND ADJUDGED, that the said judgment *nisi* entered herein on the 13th day of May, 1925, forfeiting said appeal bond, and declaring that the said defendant Charles H. Unverzagt, as principal, and the National Surety Company, as surety, forfeit and pay to the United States of America the sum of Ten Thousand [11] Dollars ($10,000.00), according to the tenor and effect of said bond, be made absolute; and it is further

ORDERED that the Clerk of the above court be, and he is hereby, authorized and directed to issue writ of execution against the property of the National Surety Company, surety upon said appeal bond for the sum of Ten Thousand Dollars ($10,000.00), together with all accrued costs herein to be taxed in the sum of ——— dollars, and all

costs which may accrue by reason of the proceedings to be had in the enforcement of said judgment, as by law provided. Deft. Surety Co. *xcepts.*

Done in open court this 9th day of Mar., 1928.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed Mar. 9, 1928. [12]

[Title of Court and Cause.]

PETITION FOR NEW TRIAL.

Comes now the National Surety Company, defendant in the writ of scire facias issued herein, and petitions the Court for a new trial upon the following grounds, to wit:

1. Irregularity in the proceedings of the Court and abuse of discretion preventing this defendant from having a fair trial; and error in law occurring at the trial, in that the Court erred

(a) In sustaining the Government's oral demurrer to the amended answer;

(b) In denying defendant's motion for nonsuit;

(c) In entering judgment for the plaintiff; and refusing to enter judgment for defendant.

2. Insufficiency of the evidence to justify the decision, in that:

(a) It appears from the evidence and the Clerk's docket in this cause that no order of this Court was previously entered herein discharging the writ of habeas corpus and ordering the defendant's removal to another district;

supposed to have been filed in this court on the 9th day of May, 1924, and said mandate refers to said order; but the records and files herein disclose that no such order was at any time made and entered. That by reason of said facts, defendant made no default, and said bond was a nullity, and the writ of scire facias should be dismissed.

JOHN P. LYCETTE.

Subscribed and sworn to before me this 17 day of June, 1927.

[Seal] WILLIAM TRUSCOTT,
Notary Public in and for the State of Washington,
Residing at Seattle. [15]

[Endorsed]: Received a copy of the within this 17 day of June, 1927.

PAUL D. COLES,
Attorney for ————.

[Endorsed]: Filed Jun. 17, 1927. [16]

[Title of Court and Cause.]

ORDER DENYING PETITION FOR NEW TRIAL AND REHEARING.

This matter having come on for hearing on the petition of the National Surety Company for a rehearing, and it appearing to the Court that a writ of habeas corpus was issued herein on May 6, 1924, and on May 7th the matter came on for hearing on the return to said writ, at which time the Court ordered the writ discharged and the defendant re-

moved, and the following correct entry was made in the Clerk's docket, to wit: "May 7, Ent. record hearing on writ. Writ to be discharged, appeal bond fixed at $10,000.00 and order of removal granted in default of bail, and motion for stay of proceedings granted until A. M. Friday for entry of final order"; that petition for appeal was filed on May 9th, and order entered allowing the same; and it further appearing that all the parties treated said order and minute entry of May 7th as a final order, and the Court being of the opinion that the petition for rehearing should be denied. Now, therefore,

IT IS HEREBY ORDERED that the National Surety Company's petition for new trial and rehearing be and the same is hereby denied.

To which the defendant, National Surety Company, excepts and exception is hereby allowed.

Done in open court this 28 day of June, 1927.

JEREMIAH NETERER,
Judge. [17]

O. K.—PAUL D. COLES,
Asst. U. S. Att.

[Endorsed]: Filed Jun. 23, 1927. [18]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the UNITED STATES OF AMERICA, Plaintiff, and to THOS. P. REVELLE, United States Attorney, and PAUL D. COLES and DAVID L. SPALDING, Assistant United States Attorneys, Its Attorneys:

You, and each of you, will please take notice that the defendant, National Surety Company, in the above-entitled cause, has appealed, and does hereby appeal, to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain judgment entered in the above-entitled court and cause on the 9th day of March, 1928, and from the whole and every part thereof.

Dated this 21st day of April, 1928.

CALDWELL & LYCETTE,
Attorneys for National Surety Company.

Copy received this 23 day of April, 1928.

PAUL D. COLES,
United States Attorney.

[Endorsed]: Filed Apr. 23, 1928. [19]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Now comes the defendant, National Surety Company, and files the following assignments of error upon which it will rely on its prosecution of the ap-

peal in the above-entitled cause from the decree made by this Honorable Court on the 9th day of March, 1928.

1. That the United States District Court for the Western District of Washington, Northern Division, erred in sustaining plaintiff and respondent's demurrer to the defendant's answer.

2. That the above-entitled court erred in granting judgment for the plaintiff and respondent.

3. That the above-entitled court erred in refusing to grant judgment for the defendant and appellant.

4. That the above-entitled court erred in refusing to grant the defendant and appellant's petition for a new trial.

WHEREFORE, appellant prays that said judgment be reversed, and that the United States District Court for the Western District of Washington be ordered to enter a judgment and order reversing said decision in said cause.

CALDWELL & LYCETTE,
Attorneys for Defendant, National Surety Company.

[Endorsed]: Filed Apr. 23, 1928. [20]

[Title of Court and Cause.]

SUPERSEDEAS AND COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, the National Surety Company, a corpora-

tion, appellant herein, as principal, and the New York Indemnity Company, a corporation organized under the laws of the State of New York, authorized to transact the business of surety in the State of Washington, and in the District of Washington, as surety, are held and firmly bound unto the United States of America, plaintiff herein, in the full and just sum of Twelve Thousand ($12,000.00) Dollars, well and truly to be paid, we bind ourselves and our, and each of our, heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 23d day of April, 1928.

The condition of this obligation is such that

WHEREAS, the above-named plaintiff, United States of America, on the 9th day of March, 1928, in the above-entitled court and action, recovered judgment against the defendant above named in the sum of Ten Thousand ($10,000.00) Dollars; and

WHEREAS, the above-named principal, National Surety Company, a corporation, has heretofore given due and proper notice that it appeals from said decision and judgment of said District Court, to the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, THEREFORE, [21] if the said principal, the National Surety Company, a corporation, shall pay to said plaintiff and respondent, the United States of America, all costs and damages that may be awarded against said National Surety Company, a

corporation, on said appeal, and shall prosecute its said appeal to effect, and answer all costs if it fail to make good its plea, and shall satisfy and perform the judgment and order appealed from, in case it shall be affirmed, and shall satisfy and perform any judgment or order which the said United States Circuit Court of Appeals for the Ninth Circuit may render or make, or order to be rendered or made by said United States District Court for the Western District of Washington, Northern Division, then this obligation to be void, otherwise to remain in full force and effect.

NATIONAL SURETY COMPANY.

[Seal] By JOHN P. LYCETTE,
Its Atty.

NEW YORK INDEMNITY COMPANY.

By (Illegible Signature).

[Seal] J. GRANT,
Resident Asst. Secretary.

The above supersedeas and cost bond on appeal is hereby approved as to form and amount.

JEREMIAH NETERER,
United States District Judge.

O. K.—PAUL D. COLES,
Asst U. S. Atty.

[Endorsed]: Filed Apr. 23, 1928. [22]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING JUNE 11, 1927, TO FILE BILL OF EXCEPTIONS.

This matter having come on regularly for hearing on the motion of the National Surety Company for an order extending the time for filing a bill of exceptions in the above-entitled matter, until Saturday, June 11th, and it appearing that there is no objection thereto,

Now, therefore, IT IS HEREBY ORDERED that the time for filing a proposed bill of exceptions in this cause be, and the same is hereby extended to and including Saturday, June 11th, 1927.

Done in open court this 8th day of June, 1927.

JEREMIAH NETERER,
Judge.

O. K.—PAUL D. COLES,
U. S. Attorney.

[Endorsed]: Filed Jun. 8, 1927. [23]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that heretofore, to wit, on the 13th day of June, 1927, this cause came on regularly for trial before the Honorable Jeremiah Neterer, one of the Judges of the above court, sitting without a jury, a written waiver of trial by

jury having been filed as required by law; the plaintiff appearing by Thos. P. Revelle and Paul D. Coles, its attorneys, and the National Surety Company appearing by Hugh M. Caldwell and John P. Lycette, its attorneys, and the defendant, Charles H. Unverzagt, not appearing.

Thereupon the following proceedings were had and testimony taken, to wit:

Thereupon Paul D. Coles, as counsel for the Government stated that in the Unverzagt case the Government was ready; that he wished to interpose a demurrer to the answer of the National Surety Company, he having stated that no written demurrer was on file. Counsel for the defendant stated that he had no objection to the demurrer being made, at this time, or orally, and suggested that it would be best to have the case tried on the evidence. The Court thereupon stated that the matter could have been disposed of upon motion, but proceeded to consider the demurrer, and asked what the record showed as to whether or not [24] the defendant was called in May, 1925, to which the Clerk responded that forfeiture was made on May 13th, 1925, according to the docket. Thereupon Mr. Coles offered in evidence the bond in the case, and on being asked by the Court what he had to say on the demurrer, replied: "I have to say this, your Honor, that the amended answer set up by the National Surety Company I believe in no way constitutes a defense to this bond or to the forfeiture."

Thereupon argument was made by counsel for the defendant. At the end of the argument the oral

demurrer interposed by counsel for the Government was sustained by the Court, to which an exception was taken, and allowed by the Court. The Court stated that in making the ruling on the demurrer, the Court takes judicial notice of the fact,—as to the first affirmative defense, that the defendant was not called upon the 13th day of May, 1925—that the record does show that he was called at that time, so there is nothing in that defense.

Thereupon counsel for the defendant asked if the Court took judicial notice of what the record shows, and the Court replied "Yes."

Thereupon counsel for defendant stated that defendant elected to stand on its answer. Demurrer was sustained and exception allowed.

Thereupon counsel for the Government asked that the forfeiture be made absolute; and counsel for defendant again stated that it elected to stand on the answer and take and exception. The Court thereupon asked if there was anything else to be offered, and counsel for the Government stated that that was all. The Court thereupon ordered that the forfeiture be made absolute, and that an order be prepared and submitted. [25]

Thereupon counsel for the defendant asked how the matter had been disposed of, whether on the demurrer or the evidence; to which the Court replied that counsel for the Government had introduced in evidence the bond, and the Court stated that he decided the case on both the evidence and the demurrer, that he ruled on the demurrer first and the evidence afterwards, the record being be-

fore him. To which an exception was taken as to both rulings.

This bill of exceptions contains in substance all the testimony offered in this case.

The National Surety Company prays that this, its bill of exceptions, may be allowed, settled and signed.

CALDWELL & LYCETTE,
Attorneys for National Surety Company.

Settled and allowed this 26 day of Sept., 1927.

JEREMIAH NETERER,
Judge.

Copy of bill of exceptions received this 11 day of June, 1927.

THOS. P. REVELLE,
Attorneys for Plaintiff.

[Endorsed]: Lodged Jun. 11, 1927. [26]

[Title of Court and Cause.]

BAIL BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, Charles H. Unverzagt, as principal, and National Surety Company, as surety, are held and firmly bound unto the United States of America, in the penal sum of Ten Thousand ($10,000.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed this 9th day of May, 1924.

WHEREAS, the said Charles H. Unverzagt filed an application for a writ of habeas corpus in the District Court of the United States for the Western District of Washington, Northern Division, Cause No. 191–C., which said writ was discharged and petitioner ordered removed to the District Court of the United States for the Western District of New York, after hearing on the 7th day of May, 1924, by the Honorable Jeremiah Neterer, United States District Judge, and said petitioner was remanded to custody of the United States Marshal for the Western District of Washington;

AND WHEREAS, said Charles H. Unverzagt prayed for and was allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from said order discharging the writ of habeas corpus and said order of removal, and it was further ordered that pending such appeal to the United States Circuit Court of Appeals for the Ninth Circuit that he should be admitted to bail in the sum of Ten Thousand ($10,000.00) Dollars for his appearance and surrender in the event said judgment is affirmed.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said Charles H. Unverzagt shall appear, either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court, and shall prosecute his appeal and shall abide by and obey the orders made by the

United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of the judgment and decree appealed from as said Court may direct if the judgment and order against him shall be affirmed or the appeal is dismissed; and shall abide by and obey all orders made by said Court or by said District Court, provided the judgment and order against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then this obligation shall be null and void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 9th day of May, 1924.

CHARLES H. UNVERZAGT.
NATIONAL SURETY COMPANY,
(Illegible Signature),
Resident Vice-President.
[Seal] Attest: J. GRANT,
Resident Assistant Secretary.

O. K.—C. T. McKINNEY,
Asst. U. S. Atty.

Approved.

NETERER,
Judge.

[Endorsed]: Filed May 9, 1924. [27]

[Title of Court and Cause.]

ORDER FOR WRIT OF HABEAS CORPUS.

Now on this 6th day of May, 1924, this cause comes on for hearing with Glen Madison and F. C. Reagan appearing for petitioner and John A. Frater for the Government. The petition herein having been presented to the Court, IT IS ORDERED that a writ of habeas corpus be issued herein directed to the marshal, returnable Wednesday, May 7, 1924, at 2 o'clock P. M.

Journal No. 12, page 189. [28]

[Title of Court and Cause.]

HEARING ON PETITION FOR WRIT OF HABEAS CORPUS.

Now on this 7th day of May, 1924, this cause comes on for hearing on petition for writ of habeas corpus which is argued and writ will be discharged. Bond on appeal is fixed at $10,000.00 and an order of removal is granted in default of $10,000 bail. Motion to stay proceedings is granted to Friday A. M. for entry of final order.

Journal No. 12, page 190. [29]

[Title of Court and Cause.]

DOCKET ENTRIES.

In the above-entitled and numbered cause at page 294 of Law Docket No. 10 the following appears:

FILINGS—PROCEEDINGS.

Date. Month. Day. Year.	
May 9, 1924.	Filed cert. copy order removing cause from Bellingham to Seattle.
May 9, 1924.	Filed petition. Appearance. (Transferred from Bellingham.)
May 6, 1924.	Ent. record hearing petition for writ of habeas corpus (at Bellingham)—Granted.
May 6, 1924.	Issued writ of habeas corpus returnable May 7, 2 P. M. and cert. copy.
May 7, 1924.	Ent. record hearing on writ—writ to be discharged; appeal bond fixed at $10,000.00 and order of removal granted in default of bail, and motion for stay of proceedings granted until Friday A. M. for entry of final order.
May 7, 1924.	Filed marshal's return to writ.
May 9, 1924.	Filed memorandum decision on petition for writ of habeas corpus. Writ discharged.

May 9, 1924. Filed warrant of removal. (Styled order of removal.)

May 9, 1924. Filed petition for appeal. Assignment of errors.

May 9, 1924. Filed and entered order allowing appeal and fixing bond $10,000.00.

May 9, 1924. Filed and entered appeal bond (Nat'l Surety Co.) $10,000.00.

May 9, 1924. Issued citation. [30]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare record on appeal consisting of—

1. Writ of scire facias.
2. Amended return to writ of scire facias.
3. Petition and affidavit for new trial,
3. Order denying new trial.
4. Waiver of jury.
5. Judgment.
6. Order extending time for bill of exceptions.
7. Bill of exceptions with exhibits attached.
8. Citation on appeal.
9. Assignments of error.
10. Notice of appeal.
11. Supersedeas bond on appeal.
12. All minute and docket entries of May 6, 7, 9, 1924.
13. This praecipe.

CALDWELL & LYCETTE,
Attys. for Appellant.

NOTICE.

Attorneys will please indorse their own filings, Rule 11.

[Endorsed]: Filed May 12, 1928. [31]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 31, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees

and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [32]

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 61 folios, at 15¢	$9.15
Certificate of Clerk to Transcript of Record, with seal	.50
Total	$9.65

I hereby certify that the above cost for preparing and certifying record, amounting to $9.65, has been paid to me by the attorney for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 17th day of May, A. D. 1928.

[Seal] ED. M. LAKIN,

Clerk United States District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [33]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

To the UNITED STATES OF AMERICA, Plaintiff, and to THOS. P. REVELLE, PAUL D. COLES and DAVID L. SPALDING, Its Attorneys:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, to be held at the city of San Francisco, State of California, in the Ninth Judicial Circuit, on the 23d day of May, 1928, pursuant to a notice of appeal filed in the office of the Clerk of the above-entitled court, appealing from the final judgment signed and filed herein on the 9th day of March, 1927, wherein the United States of America is plaintiff and the National Surety Company, a corporation, is defendant and appellant; to show cause, if any there be, why the judgment rendered against the said appellant as in said notice of appeal mentioned should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, United States District Judge for the Western District of Washington, Northern Division, this 23 day of April, 1928.

[Seal] JEREMIAH NETERER,
United States District Judge.

Copy received.

PAUL D. COLE,
Asst. U. S. Atty.

[Endorsed]: Filed Apr. 23, 1928. [34]

[Endorsed]: No. 5496. United States Circuit Court of Appeals for the Ninth Circuit. National Surety Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 21, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5496

NATIONAL SURETY COMPANY, a corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Appellant's Opening Brief

CALDWELL & LYCETTE,
Attorneys for Appellant.

1311 Alaska Building
Seattle, Washington

MARTIN & DICKSON, *Printers*

In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5496

NATIONAL SURETY COMPANY, a corporation,
Appellant,

v.

UNITED STATES OF AMERICA ,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Appellant's Opening Brief

This appeal was perfected by filing a notice of appeal, assignments of error, bond and citation on appeal, on April 23, 1928, prior to the return to the rules requiring a petition and order allowing appeal.

The appeal involves only questions of law. The testimony is extremely short and undisputed.

This appeal is from a judgment in favor of the United States after a hearing on a Writ of Scire Facias on a bail bond.

STATEMENT OF THE CASE

A. *History.* In order that a proper understanding of the relation of the events, pleadings and evidence in the case may be had, we present a brief history. One Charles Unverzagt was originally arrested by the U. S. Marshal at Blaine, Washington, in removal proceedings, on May 5, 1924, on a fugitive warrant based on two indictments pending against him in a New York federal court. He was brought before a commissioner at Bellingham, Washington, and immediately sought a writ of habeas corpus, which was granted by Judge Neterer on May 6, 1924, and made returnable the following day, May 7, 1924 (Tr. 28). On May 7, 1924, the marshal made his return and hearing was had on the return; an order was made discharging the writ, fixing the bond on appeal at $10,000.00, granting an order of removal in default of bail, and granting a motion for stay of proceedings until "Friday (May 9) for the entry of a *final order.*" The journal entry made at that time reads (Tr. 28):

> "Now on this 7th day of May, 1924, this cause comes on for hearing on petition for writ of habeas corpus which is argued and writ will be discharged. Bond on appeal is fixed at $10,000.00 and an order of removal is granted in default of $10,000 bail. Motion to stay proceedings is granted to Friday A. M. for entry of final order. Journal No. 12, page 190."

No final order was ever entered on "Friday" May 9, or at any other time. A petition for appeal was filed and an order entered allowing the appeal and fixing the appeal bond at $10,000. This bail bond on appeal was filed.

The Government's theory of this case is that, thereafter the appeal came before this Circuit Court and the decision of the trial court was affirmed; that after the affirmance, to-wit: on May 13, 1925, Unverzagt was called to come into the district court and obey the order (of May 9, 1924) discharging the writ of habeas corpus and ordering his removal to New York; that he "came not but made default;" that thereupon, on *ex parte* motion of the Government, a forfeiture *nisi* of the bail was made. The writ of *scire facias* here involved was based on that judgment *nisi*.

It will also appear that after Unverzagt had obtained a writ of habeas corpus to test the legality of his *first* arrest, of May 5, 1924, and while he was at

liberty on a $10,000 bail bond on appeal executed by this appellant as surety, pending the outcome of his appeal from the decision discharging the writ of habeas corpus, he was *again arrested* by the U. S. Marshal. This *second* arrest was on the same charge as the one on which he was originally arrested. Unverzagt sued out a second writ of habeas corpus to test the legality of his second arrest, and on the writ being discharged he took an appeal in said *second* case, and obtained his liberty on an entirely new $10,000 *property* bond, with new sureties.

B. *Pleadings—The Writ.* The writ (Tr. 1-3) alleges in substance: That on May 9, 1924, a bail bond for $10,000 was executed by the defendant, Unverzagt, as principal and the National Surety Company as surety, *conditioned* for the appearance of Unverzagt before the *district* court at Seattle, to abide by and obey a judgment or order of said court *previously* entered against him "discharging the writ of habeas corpus and ordering his removal" to a district court in New York; said bail bond was filed with the clerk; that on May 13, 1925, said Unverzagt, being called to answer and obey said order previously entered, which order had been appealed from and affirmed by the Circuit Court, came not but defaulted; that on motion

of the United States it was considered by the court that said Unverzagt as principal, and appellant as surety, forfeit $10,000 "according to the tenor and effect of said recognizance and *property* bond," unless they appear and show cause to the contrary. Then follows the summons to appear and show cause why the judgment *nisi* should not be made absolute and execution issue for the amount due on said *property* bond.

Amended Return and Answer (Tr. 4-8). The appellant's amended return and answer admits that it, as surety, executed a $10,000 bail bond on May 9, 1924, for Unverzagt; but denies that said bail bond was conditioned for Unverzagt's appearance in said court to obey a judgment and order of said court previously entered against Unverzagt; denies that on May 13, 1925, or at any other time, Unverzagt was called to come in and obey an order previously entered against him; and denies that appellant or said Unverzagt made any default whatsoever on said bond.

The answer then alleges, as a *first affirmative defense* (Tr. 5-6), that Unverzagt was *first* arrested at Blaine, Washington, on May 5, 1924, on a fugitive warrant based on two indictments in New York; that habeas corpus proceedings were instituted in the dis-

trict court at Seattle to test the legality of the arrest (the bail bond in question was given on appeal in said *first* proceeding); that during the pendency of said habeas corpus proceedings said Unverzagt was again arrested, and that said *second* arrest was based upon one of the same New York indictments upon which he had originally been arrested; that habeas corpus proceedings were instituted to test the legality of said second arrest; that in said second proceedings the writ was again discharged and an appeal taken to the Circuit Court, and Unverzagt given his liberty on a new $10,000 *property* bonds with individuals, Casey and Pendleton, as sureties; and that said second appeal was to test the legality of the arrest on one of the indictments on which Unverzagt had originally been arrested at Blaine; *that said second arrest was on the same charge on which said Unverzagt was originally arrested,* and that said property bond superseded and took the place of the first bail bond previously executed by appellant.

The *second affirmative defense* (Tr. 7) alleges that the writ of *scire facias* issued summoned appellant to show cause why execution should not be issued against it under said "*property bond,*" and that the property bond intended to be forfeited was the property bond

signed by Unverzagt with Casey and Pendleton as sureties; that the *scire facias* should have been directed to said Unverzagt, Casey and Pendleton; that the writ issued against appellant was issued by mistake.

The *third affirmative defense* (Tr. 7) alleges that at the time appellant executed the first bond, the only order which had been issued was an order dismissing the writ of habeas corpus; that particularly no order of removal had been issued; that Unverzagt has never been ordered to do anything which he had not done; that Unverzagt has not failed to obey any order which he was bound by said bond to obey.

The *fourth affirmative defense* (Tr. 8) alleges that the writ of *scire facias* alleges that said Unverzagt failed to abide by the judgment of the court previously entered; that the writ of *scire facias* was null and void.

Reply. No reply was made to any of the four affirmative defenses.

TRIAL AND DEMURRER

On these pleadings (writ and amended answer) the cause came to trial before the court without a jury, a written waiver of jury having been filed (Tr. 9).

The proceedings and evidence, extremely short and uncontradicted, are brought here by bill of exceptions (Tr. 22-24).

The *Bill of Exceptions* recites that the cause came on regularly for trial and the following proceedings were had and testimony taken (Tr. 23); Mr. Coles, counsel for the Government, stated that the Government was ready; that he wished to interpose an oral demurrer to the answer. Counsel for the defendant stated that he had no objection to the demurrer being made orally at that time, and suggested that it would be best to have the case tried on the evidence. The court proceeded to consider the demurrer, and the following took place (Tr. 23):

> "Thereupon Mr. Coles offered in evidence the bond in the case, and on being asked by the court what he had to say on the demurrer, replied: 'I have to say this, Your Honor, that the amended answer set up by the National Surety Company I believe in no way constitutes a defense to this bond or to the forfeiture'."

Thereupon argument was made and at the end of the argument the demurrer interposed by the Government was sustained, and exception taken. The defendant elected to stand on its answer and the demurrer was again sustained (Tr. 24):

"Thereupon counsel for the Government asked that the forfeiture be made absolute, and counsel for defendant again stated that it elects to stand on the answer and take an exception. The court thereupon asked if there was anything else to be offered, and counsel for the Government stated that was all. The court thereupon ordered that the forfeiture be made absolute and an order be prepared and submitted.

"Thereupon counsel for the defendant asked how the matter had been disposed of, whether on the demurrer or the evidence; to which the court replied that counsel for the Government had introduced in evidence the bond, and the Court stated that he decided the case on both the evidence and the demurrer."

It will thus be noted that the Government admitted the affirmative allegations of the answer by failing to reply to them, and by demurring to their sufficiency, at the time of the trial; that the court sustained the Government's demurrer to the answer, and also decided the case on both the demurrer and the evidence; that the only evidence whatsoever introduced to support the judgment on the merits was the bond itself. These matters are the basis of appellant's assignments of error and claim for reversal.

Motion for New Trial. A petition for new trial was timely filed (Tr. 13) alleging error as follows: That the court erred (a) in sustaining the Govern-

ment's oral demurrer to the amended answer, (b) in denying the defendant's motion for non-suit, (c) in entering judgment for the plaintiff, and refusing to enter judgment for the defendant; (d) that the evidence was insufficient to justify the decision in that (1) it appeared from the evidence that the clerk's docket in the cause that no order was previously entered herein discharging the writ of habeas corpus and ordering the defendant's removal to another district; (2) it appeared that no order was ever made by this court which the defendant has not complied with; (3) there is no evidence whatsoever to show that the defendant had been called into court to answer or abide by any order previously entered which had been appealed from and affirmed by the Circuit Court of Appeals; (4) that there is no evidence that the defendant Unverzagt made default; (5) that there is no evidence that the defendant at any time failed to obey the order of this court, which he was bound to obey, and which was covered by said bond; (6) that it appears affirmatively from the evidence that the bond in the case was superseded by a subsequent property bond; (7) that the bond was given to be effective only if this court was reversed by the Circuit Court of Appeals, and it appears affirmatively herein that the judgment was not reversed, but affirmed.

The petition was supported by an uncontradicted affidavit (Tr. 15) setting forth that the records and files show that no order was at any time made by the court discharging the writ of habeas corpus and ordering the removal of the defendant as claimed.

A written order (Tr. 16) was entered, denying the petition for new trial and re-hearing.

Judgment. Thereafter a formal written judgment (Tr. 10) for $10,000 was entered against appellant and an exception taken. This appeal follows:

ASSIGNMENTS OF ERROR (Tr. 18)

Errors were assigned as follows: (1) That the court erred in sustaining the plaintiff and respondent's demurrer to defendant's answer; (2) that the court erred in granting judgment for the plaintiff and respondent; (3) that the court erred in refusing to grant judgment for the defendant and appellant; (4) that the court erred in refusing to grant the defendant's petition for new trial.

ARGUMENT

I.

THE COURT ERRED IN SUSTAINING THE DEMURRER TO THE ANSWER (ASSIGNMENT OF ERROR NO. 1).

A. *A demurrer to the answer cannot be sustained where the answer denies material and essential allegations of the writ.*

It is elementary that scire facias proceedings on a bail bond are, in effect, the commencement of a new or original action. The writ is simply the declaration or complaint. It must state facts constituting a complete cause of action. The defendant must plead to the writ by demurrer or answer. Where the answer contains affirmative matter plaintiff must demur or reply. Likewise, plaintiff must prove all the essential allegations pleaded.

Hollister v. U. S., 145 Fed. 773, p. 779;

Kirk v. U. S., 124 Fed. 324;

Kirk v. U. S., 131 Fed. 331;

Winder v. Caldwell, 14 L. Ed. 487, p. 491;

U. S. v. Hall, 37 L. Ed. 332, 147 U. S. 687;

Universal Transport Co. v. National Surety Co., 252 Fed. 293;

Davis v. Packard, 8 L. Ed. 684;

Dixon v. Wilkinson, 11 L. Ed. 491;

24 R. C. L. 676, Sec. 17;

3 R. C. L. 65, Sec. 80;

35 Cyc. 1152-4-8;

Foster on Federal Practice, pp. 2379-83.

Hollister v. U. S., 145 Fed. 773, *supra,* contains an excellent discussion with many citations from the Supreme Court on the nature of a writ of scire facias.

At page 779 it is said:

> "A writ of scire facias on a forfeited recognizance is a judicial writ founded upon, and to be proved by, the record of the court taking it. Decisions of state courts are numerous and conflicting as to whether it is the commencement of a civil action or a continuation of some other original proceeding, whether it performs the function of a writ only or those of a writ and declaration, and whether the defendant may plead to the writ or whether the plea goes to the record on which it is founded. But as the decisions of the Supreme Court of the United States are clear and controlling on these questions, the long list of cases to which our attention is called need not be considered for the purpose of extracting a rule for our government. In *Winder v. Caldwell,* 14 How. 434, 14 L. Ed. 487, it is said:
>
> " 'A scire facias is a judicial writ used to enforce the execution of some matter of record, on which it is usually founded; but though a judicial writ, or writ of execution, it is so far an original that the defendant may plead to it. As it discloses the facts on which it is founded, and requires an

answer from the defendant, it is in the nature of a declaration, and the plea is properly to the writ.'

"In *United States v. Payne,* 147 U. S. 687, 13 Sup. Ct. 442, 37 L. Ed. 332, it is said: 'While a scire facias to revive a judgment is merely a continuation of the original suit, a scire facias upon a recognizance * * * * is as much an original cause as an action of debt upon a recognizance, or a bill in equity to annual a patent,' citing *Winder v. Caldwell,* and *Stone v. U. S.*, 2 Wall 525, 16 L. Ed. 765."

In *U. S. v. John W. Payne,* 147 U. S. 687, 37 L. Ed. 332, it was said: ffl

"A scire facias upon a recognizance * * * * is as much an original cause as an action of debt upon a recognizance * * * *."

In 3 *R. C. L.* p. 65, Sec. 80, it is said:

"Scire facias against bail is the commencement of a new action, because it issues against a person who was not a party to the record in the original action."

In *Kirk v. U. S.,* 124 Fed. 324, it is said, at p. 336:

"In the scire facias proceedings properly instituted by due service, the defendant may appear and plead and have a trial of all questions and matters of defense, and the proceeding is but a suit to enforce the penalty of the recognizance, and differs from any other suit to enforce it only in the process by which it is commenced."

Thus it is obvious that the writ (complaint) must allege all the facts constituting the cause of action.

This the respondent recognized because it pleaded the facts. The defendant, however, had a right to deny the existence of any or all of the material allegations. When the answer made such denial, an issue of fact was presented, which precluded disposition of the case by demurrer. The court having sustained the demurrer, the defendant was refused the right to compel the plaintiff to prove the denied facts, or to disprove such denied facts if established by the plaintiff. In other words, sustaining the demurrer precluded any defense to the action.

An examination of the pleadings will disclose that certain material facts were denied. Later in this brief we will show that not only was the defendant refused the right to deny the facts, but that the plaintiff was granted judgment without proving the facts.

(1) The writ alleges (Tr. 2) that the bond on which the suit was brought "was conditioned for the appearance of the said defendant before the U. S. District Court * * * * at Seattle and from time to time and term to term thereafter, to abide by and obey a judgment and order of this court previously entered against said defendant, discharging a writ of habeas corpus and ordering his removal to the United States District Court * * * * of New York." And fol-

lows this later with the allegation that Unverzagt was called to come and abide by the order previously entered against him.

The answer admits the bond *but* denies (Tr. 5) that such was the condition of the bond. If it was not the condition of the bond then there would be no cause of action. A bond conditioned other than as alleged would be a good defense. Consequently the demurrer was bad.

(2) The writ alleges (Tr. 2), that after giving the bond, to-wit: on May 13, 1925, Unverzagt was called to come into court and obey the order previously entered. The answer (Tr. 5) denies that Unverzagt was so called on May 13, 1925, or at any other time. This certainly was sufficient to raise an issue of fact.

PLAINTIFF WAS BOUND TO PROVE A BREACH OF THE CONDITION OF THE BOND BY SHOWING THAT THE DEFENDANT WAS CALLED AND DID NOT COME.

Dillingham v. U. S., 7 Fed. Cas. 3913;

U. S. v. Rundlett, 27 Fed. Cas. 16208; 6 C. J. 1072;

Brooks v. U. S. (Okla.), 27 Pac. 311;

Note in 5 L. R. A. (N. S.), 402;

State v. Dorr (W. Va.), 53 S. E. 120, 5 L.R.A. (N. S.) 402;

State v. Kinne, 39 N. Hamp. 138;
Philbrick v. Buxton, 43 N. Hamp. 463.

In *Dillingham v. U. S.,* 7 Fed. Cas. No. 3913, plaintiff failed to prove that the defendant was called. The Honorable J. Washington held this a necessity, saying:

> "We hold it to be essential to the breach of the condition upon which the forfeiture is to arise, that the party who is recognized to appear, shall be solemnly called before his default is entered; and even if the default can be proved by the parol evidence of the magistrate before whom the appearance was to be, which we very seriously question, it should clearly be proved that the party was called and warned, and neglected to appear. This is far from being a matter of form only, but, on the contrary, is a humane provision to prevent a forfeiture accruing from the ignorance or inattention of the accused."

In *U. S. v. Rundlett,* 27 Fed. Cas. No. 16208, an action on a recognizance, it was said:

> "To maintain an action on a recognizance the declaration must show a breach of the conditions * * * *. One of these rules of law requires the principal cognizor to be called and his default entered; the legal effect of the condition is such, that it is not broken by non-appearance, generally, to be proved by any evidence, but only non-appearance in answer to a call, to be proved by an entry made on the minutes of the magistrate, and returned by him as part of the proceedings. This has been decided in New Hampshire, and else-

where, upon reasons which to me are satisfactory. *State v. Chesley,* 4 N. Hamp. 366; *Dillingham v. U. S.,* Fed. Cas. No. 3913; *State v. Grigsby,* 3 Yerg. 280; *White v. State,* 5 Yerg. 183; *Clark v. State,* 4 Ga. 329. It is clear also that the declaration must show a default to answer to a call, made at a time and place, when and where the cognizor was bound by law to answer."

In *Brooks v. U. S.* (Okla.), 27 Pac. 311, in a suit on a recognizance, it was held, at p. 311:

"Every precedent of such action, which we have found, indicates that such suits are always based on recognizances duly forfeited by judicial order, and that the declaration in every such case must allege that the defendant in the recognizance was duly called at the proper time and place, and the recognizance forfeited. It is unquestionable that the breach must be established by record, and cannot be shown by proof *aliunde. People v. Van Eps,* 4 Wend. 388. It is essential to a breach of the contract of a recognizance that the declaration must show that the party who was to appear was solemnly called and warned."

In the note in 5 L. R. A. (N. S.), 402, it is stated:

"The weight of authority holds, although, as subsequently shown, there are several exceptions, that it is essential that a defendant who has given a recognizance to appear in court at a certain time, should be formally called; and the record must show not only that he was present, but that he was called, before a default can possibly be entered against him or his surety." (Citing cases.)

Consequently, the denial in the answer of the allegation that Unverzagt was called, raised an issue of fact, and it was error to sustain the demurrer to the answer.

(3) The writ further alleges (Tr. 2) that the defendant made default. This the answer directly denies (Tr. 5); and further denies said fact affirmatively by alleging (Tr. 7) that Unverzagt had never been ordered to do anything which he had not done; that he had not failed to obey any order which he was bound by said bond to obey, and that Unverzagt had not failed to abide by any order of court previously entered.

The authorities cited clearly show that it is necessary to allege and prove a default. Consequently, a denial that a default occurred raises a proper issue of fact.

B. *Each of the four affirmative defenses in the answer constitutes a good defense.*

(1) *First Affirmative Defense* (Tr. 5-6). The first affirmative defense alleges in substance that the defendant Unverzagt was *first* arrested at Blaine, Washington, on May 7, 1925, on a fugitive warrant based on two indictments against him in New York, and habeas corpus proceedings were instituted to test

the legality of this arrest. It was in this first proceeding that Unverzagt gave the bond here in question as an appeal bond to obtain his liberty while an appeal was pending on the first habeas corpus proceeding. The affirmative defense then alleges that while the first habeas corpus proceeding was still pending the defendant Unverzagt was arrested a *second time* on one of the *same* New York indictments upon which he was arrested the first time. On the second arrest he again instituted habeas corpus proceedings, and on the writ being discharged he appealed to this court and pending appeal obtained his release upon a second and entirely new $10,000 bond, with new sureties, "that said appeal (second) was to test the legality of the arrest on one of the indictments said defendant had been originally arrested on, at Blaine, Washington; that said second arrest was on the same charge on which said Unverzagt was originally arrested; that said property bond superseded and took the place of the aforesaid bail bond previously executed by this surety." (Tr. 6.)

A Re-Arrest On the Same Charge Releases the Bail.

6 Corpus Juris, 1027;
3 R. C. L. 52, Sec. 63;
U. S. v. Atwell, 24 Fed. Cas. No. 14475.

It is almost too elementary to require citation of authorities that the re-arrest of the defendant on the same charge discharges his sureties. The consideration for the bail bond is the liberty given the defendant. When that is taken from the defendant the consideration fails.

Likewise the surety undertakes his obligation on condition that he becomes the defendant's jailer. When the government itself elects to become jailer the surety has no further right or duty and the bond is discharged. The rule is well stated in 6 Corpus Juris, 1027:

> "Where, after giving bail, the prisoner is re-arrested or ordered into custody on the same charge or for the same offense, his sureties are discharged, as the only consideration on the undertaking accruing to the sureties is their custody of the prisoner, and when this consideration fails their liability ceases, nor are they liable where the prisoner escaped after such arrest."

So also see 3 R. C. L. p. 52, Sec. 63.

In *U. S. v. Atwell,* 24 Fed. Cas. No. 14475, it was said, at p. 890:

> "He (surety) would be discharged from the obligation of his liability if the United States subsequently arrested the principal on a bench warrant or an indictment for the same offense * * *."

Consequently, the affirmative defense alleging that the defendant was re-arrested by the United States, and that said second arrest was on the same charge on which he was originally arrested, stated a good defense, and the demurrer was improperly sustained.

(2) *Second Affirmative Defense.* It will be noted that the bail bond in question (Tr. 25) was a *"corporate surety"* bond, given by a company authorized to engage in that business. The bond given in the second arrest was a *"property bond"* signed by two individuals.

The writ in this case refers to the "property bond," and the second affirmative defense alleges (Tr. 7):

> "That the writ of scire facias issued herein summons said principal and surety to show cause, if any they have, why they ought not to have execution issued against them under said 'property bond;' that the bond intended to be forfeited is the property bond signed by Chas. H. Unverzagt as principal, and M. H. Casey and Agnes A. Pendleton, as sureties; that said writ of scire facias should have been directed to said Chas. H. Unverzagt and said M. H. Casey and said Agnes A. Pendleton; that the writ issued against this surety was issued by mistake."

This is admitted by the demurrer. Consequently, a good defense was stated.

(3) *Third Affirmative Defense* (Tr. 7). The writ (Tr. 2) alleges that Unverzagt gave a bond to secure his appearance for *removal* to New York pursuant to an order previously entered, thus, "to abide by and obey a judgment and order of this court previously entered against said defendant discharging the writ of habeas corpus and ordering his removal to the U. S. District Court for * * * * New York," and that he failed to appear for removal.

This third affirmative defense first denies that any such order of removal was ever made. Obviously Unverzagt could not fail to appear for removal if no order of removal was ever made. Consequently this defense was a good one and required proof by the plaintiff.

Furthermore, this defense alleges (Tr. 7) that Unverzagt had never been ordered to do anything which he had not done; that he had not failed to obey any order which he was bound by said bond to obey. This in itself constitutes a good defense, for certainly a bond could not be forfeited where the defendant had done everything he had been required to do, and had not failed to do anything the bond required him to do.

(4) *The Fourth Affirmative Defense* in effect realleges the matters set forth in the third affirmative

defense, viz (Tr. 8): that the writ claims Unverzagt failed to abide by the judgment of the court previously entered; that in fact Unverzagt had not failed to abide by any order of the court previously entered.

The defendant was certainly entitled to prove that Unverzagt had never failed to abide by any judgment previously entered, *or,* compel the Government to prove that Unverzagt had so failed. Either proposition raises an issue of fact.

THEREFORE, the answer was proof against demurrer, because (1) denials of essential allegations of the writ raised material issues of fact; and (2) the four affirmative defenses were good.

IT IS ERROR TO SUSTAIN A GENERAL DEMURRER TO A PLEADING WHICH IS GOOD IN ANY PART.

Heid v. Edner, 133 Fed. 156, CCA 9;

State v. Caruso, 137 Wash. 519, 243 Pac. 14;

Whitenack v. Philadelphia & R. R. Co., 57 Fed. 901, CCA;

Burders v. Mazetta Mfg. Co., 198 Fed. 855, CCA7;

Eldorado Coal & M. Co. v. Mariotti, 215 Fed. 51 CCA7;

Rem. Comp. Stat. Washington, Secs. 264, 276, 277, 278.

In *Heid v. Edner,* 133 Fed. 156, this Court passed upon this exact question. The Court said, p. 157:

> "The errors relied upon by the defendant are the action of the trial court in sustaining plaintiff's demurred to the amended answer * * * *. Defendant's answer consisted of two parts; the first, a denial of the material allegations of the complaint; and second, a defense setting up new matters.
>
> "The demurrer to the answer was general, on the ground that it did not state facts sufficient to constitute a defense. Section 68 of the Code of Civil Procedure of Alaska provides: 'The plaintiff may demur to an answer containing new matters when it appears upon the face thereof that said new matter does not constitute a defense or counterclaim * * * *'. In *Tobey v. Ferguson,* 3 Ore. 28, the Supreme Court of Oregon had before it an action for false imprisonment. The defendant had denied some of the allegations in the complaint, and had made further answer. The plaintiff demurred to this further answer. The court found that a portion of this further answer was well pleaded and amounted to a defense, that, as the demurrer struck at the whole of the further answer, it should be overruled. In the present case, the demurrer was to the whole of the answer, and should have been overruled, first, because the answer denied the material allegations of the complaint, and to that extent was a good pleading; and, second, because the demurrer was not directed to the new matter set up in the answer as required by the code.
>
> "The order of the court sustaining this demurrer recited that the court treated the demurrer also as a motion to make the answer more

> definite and certain. But this recital did not dispose of the issue raised by the general denial of the answer, nor did it confine the demurrer to the new matter in the answer."

The statutes of Washington are similar. Rem. Comp. Stat. Sec. 264:

> "The answer of the defendant must contain, 1, a general or specific denial of each material allegation of the complaint controverted by the defendant * * * *; 2, a statement of any new matter constituting a defense * * * *."

Sec. 276:

> "The plaintiff may demur to an answer containing new matter when it appears upon the face thereof that such new matter does not constitute a defense or counterclaim, or he may for like cause demur to one or more of such defenses or counterclaims, and reply to the residue."

In *State v. Caruso,* 137 Wash. 519, 243, P. 14, exactly the same ruling was made in an action on a bail bond.

Conclusion—Those matters were all brought to the court's attention on the petition for new trial (Tr. 13), and it was error to sustain the demurrer to the answer.

The points just considered have a further bearing on the case and clearly show that not only should the demurrer have been overruled, but also that judgment should have been given for defendant.

II.

THE COURT ERRED IN GRANTING JUDGMENT FOR PLAINTIFF (RESPONDENT) AND ERRED IN REFUSING TO GRANT JUDGMENT FOR DEFENDANT (APPELLANT). (ASSIGNMENTS OF ERROR NOS. 2 AND 3.)

A. The *four affirmative defenses set forth in the answer are admitted and constitute a complete defense.*

In General. The answer (Tr. 4-8) contains four affirmative defenses. No reply was filed to any of these defenses, the Government taking the position that none of the defenses constituted a defense to the bond forfeiture. The Government put in evidence the bond and demurred to the answer. The bill of exceptions (Tr. 23) shows that the case was called for trial, the Government stated it was ready for trial; the Government demurred; counsel for appellant suggested that the cause be tried on the merits; counsel for the Government put in evidence the bond; the proceedings being as follows (Tr. 23):

> "Thereupon Mr. Coles offered in evidence the bond in the case, and on being asked by the court what he had to say on the demurrer replied: 'I have to say this, Your Honor, that the amended answer set up by the National Surety Company I believe in no way constitutes a defense to this bond or to the forfeiture.'

> "Thereupon argument was made by counsel for the defendant. At the end of the argument the oral demurrer interposed by counsel for the Government was sustained by the court, to which an exception was taken and allowed by the court."

Appellant elected to stand upon its answer. The court then granted judgment for the Government on the merits.

The allegations in the four affirmative defenses in the answer were admitted by the failure of the plaintiff to reply to them, and were further admitted by the plaintiff's demurrer to them during the course of the trial, stating, after evidence was submitted, as above quoted, that the amended answer set up by the National Surety Company in no way constitutes a defense to the bond or the forfeiture.

LAW

As stated before, the writ is but the complaint or declaration and the plaintiff must answer to it. See cases cited above, p. 12.

The plaintiff must reply to the affirmative matter in the answer.

35 Cyc. 1154-5;

Rem. Comp. Stat. Washington, Secs. 264, 276, 277, 278;

21 R. C. L. Sec. 120, p. 561;
Pierce v. Brown, 7 Wall. 205, 19 L. Ed. 134;
Smith v. Ormsby, 20 Wash. 396, 55 Pac. 570;
Johnson v. Maxwell, 2 Wash. 482, 25 Pac. 904;
English v. Arizona, 214 U. S. 359;
Deputron v. Young, 134 U. S. 241, 33 L. Ed. 923.

The scire facias is either governed by the common law or by the Washington code. Under the common law the plaintiff was, of course, required to reply to the affirmative matter in the answer. Failure so to do irrevocably admits the truth of the affirmative allegations of the answer.

In *Pierce v. Brown,* 7 Wall. 205, 19 L. Ed. 134, it was said, at p. 136:

> "The legal effect of a replication is, that it puts at issue all matters well alleged in the answer, and the rule is, that if none be filed, the answer will be taken as true, and no evidence can be given by the complainant to contradict anything which is therein well alleged. 1 Barb. Ch. Cr. 249; *Mills v. Pitman,* 1 Paige Ch. Cr. 490; *Pierce v. West,*. 1 Pet. G. C. 351; Story Eq. Pl. 878; Cooper Eq. Pl. 329."

In 21 R. C .L. Sec. 120, p. 561, it is said:

> "One of the primary rules of pleading is that where there is a material averment, which is traversible, but which is not traversed by the other party, it is admitted."

Washington Statutes and Decisions

Under the Federal practice rule (R. S. 721) the matter of pleading is, of course, governed by the state statutes. Rule 10 of this district also so provides. The *Washington statutes* require a reply, and in the absence of a reply the allegations of the answer are admitted. Rem. Comp. Stat. of Washington, Secs. 264, 270-277. Rem. 264:

> "The answer of the defendant must contain, 1, a general or specific denial of each material allegation of the complaint controverted by the defendant * * * *; 2, a statement of any new matter constituting a defense * * * *."

Sec. 276:

> "The plaintiff may demur to an answer containing new matter, when it appears upon the face thereof that such new matter does not constitute a defense or counterclaim, or he may for like cause demur to one or more of such defenses or counterclaims, and reply to the residue."

Sec. 277:

> "When the answer contains new matter constituting a defense or counterclaim the plaintiff may reply to such new matter, denying generally or specifically the allegations controverted by him * * * * and he may allege in ordinary concise language * * * * any new matter not inconsistent with the complaint, constituting a defense to such new matter in the answer."

Sec. 278:

> "If the answer contains a statement of new matter constituting a defense * * * * and the plaintiff failed to reply or demur thereto within the time prescribed by law, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it, he may have a jury called to assess the damages."

In *Johnson v. Maxwell,* 2 Wash. 482, 25 Pac. 570, it was said, p. 483:

> "No reply was filed by plaintiff to the affirmative allegations of the answer, and on the trial counsel for defendant claimed that those allegations were thereby admitted to be true. The court ruled otherwise, and treated the affirmative matter as denied, and permitted testimony to be given accordingly. This is in direct contravention of Sec. 103 of the code, which provides that every material allegation of new matter in the answer, not controverted by the reply, shall, for the purpose of the action, be taken as true, and was error."

In *Smith v. Ormsby,* 20 Wash. 396, 55 Pac. 570, it was held that the failure to reply to affirmative matter in the answer gives such affirmative matter the force of a finding of fact by the court, the court saying, at p. 398:

> "The answer affirmatively set up that the contract, upon which the judgment was obtained, was void, because at the time of his entering into it, the town was beyond the constitutional limit of

> indebtedness. To this there was no reply, and that part of the answer pertaining to it must be considered as equivalent to a finding of the court."

The demurrer made during the time of the trial, together with the reply, presented a situation similar to a motion by the Government for judgment on the pleadings, so that it remains simply to be seen whether or not the answer presented facts constituting a good defense. If it did, the allegations being admitted, the judgment should be reversed with instructions to grant judgment for the appellant.

A GOOD DEFENSE WAS PRESENTED

(1) *The first affirmative defense* (Tr. 5-6) has already been discussed (p. 19-20 herein), where it was shown that said defense presented a case of re-arrest on the same charge as the defendant was originally arrested upon. It was alleged that Unverzagt was originally arrested at Blaine on a fugitive warrant; habeas corpus proceedings brought to test the legality of the arrest; the writ discharged; an appeal taken, and the bail bond on appeal here in question given; that during the pendency of said proceedings Unverzagt was again arrested; "that said second arrest was on the same charge on which said Unverzagt was originally arrested;" that habeas corpus proceedings

were again brought; the writ discharged; a second appeal taken with a new and distinct bail bond on appeal with new sureties given.

As pointed out above (p. 20) the law is well settled that a second arrest on the same charge releases the sureties on the original bond. (*See cases and quotations above, p.* 20 *herein.*)

Result. Consequently this defense is good, and being admitted in such manner as to make it virtually a finding of fact (*Smith v. Ormsby,* 20 Wash. 396 *supra*) the judgment was erroneous and should be reversed with instructions to dismiss.

(2) *Second Affirmative Defense* (Tr. 7). It will be remembered that on the first arrest a *"corporate surety"* bond was given. On the second arrest a *"property bond"* with Casey and Pendleton as sureties was given. The second affirmative defense alleges that the writ of scire facias in this action was against said "property bond;" that the bond intended to be forfeited is the property bond signed by Unverzagt and Casey and Pendleton; that the writ of scire facias should have been directed to Casey and Pendleton; that the writ issued against this defendant was issued by mistake.

Certainly, if these facts are true, and the truth is admitted by the demurrer and failure to reply, the action must be dismissed.

(3) *Third Affirmative Defense* (Tr. 7) alleges that at the time defendant executed its bond for Unverzagt the only order which had been issued was an order dismissing the writ of habeas corpus; that in particular no order or removal had been issued; that Unverzagt had never been ordered to do anything which he had not done; that he has not failed to obey any order which he was bound by said bond to obey.

A. The writ is based on the theory that Unverzagt made default in failing to appear and abide by an order previously made "ordering his (Unversagt's) removal to the U. S. District Court * * * * of New York."

This defense sets up affirmatively "that no order of removal had been issued * * * *; that said Unverzagt has never been ordered to do anything which he has not done; that Unverzagt has not failed to obey any order which he was bound by said bond to obey." Certainly, if this be true, and it is admitted by failure to reply, there could be no default and the judgment should be reversed and dismissed.

(4) *The Fourth Affirmative Defense* (Tr. 8) alleges substantially the same things and in substance states that said Unverzagt did not fail to abide by any order of the court previously entered.

Conclusion—The facts alleged in the four affirmative defenses were admitted both by demurrer and failure to reply, and constitute and have the force of a finding of fact by the court. They state a good defense and the action should be reversed and dismissed.

III.

THE MERITS

In Any Event the Government Failed to Prove the Facts Essential to Establish Its Case (Assignments of Error Nos. 2 and 3).

THE UNCONTRADICTED EVIDENCE REQUIRES A JUDGMENT FOR DEFENDANT.

Decision of Trial Court. The testimony offered was uncontradicted and the trial court not only decided the case on the demurrer but also gave judgment *on the merits* (Tr. 24). Formal written judgment was entered subsequently (Tr. 10).

Was there any evidence whatsoever to support the judgment?

The cases cited show that the writ must of necessity allege certain essential facts, and that those facts must be proved. The plaintiff here utterly failed to prove the necessary facts.

The writ alleges the following essential facts: (1) That said bond was conditioned for the appearance of Unversagt before the district court at Seattle from time to time and term to term, and to abide by and obey an order and judgment of the district court previously entered discharging the writ of habeas corpus and directing his removal (Tr. 2). (2) That on May 13, 1925, Unverzagt was called to come into court and abide by the previous order of the court (Tr. 2). (3) That the order appealed from had been affirmed; (4) that Unverzagt came not. That Unverzagt defaulted; that the bond was forfeited and judgment *nisi* rendered. This was all denied (Tr. 5-8).

To determine whether or not these facts were proved we must *examine the bill of exceptions* (Tr. 22-25) which as certified by the court contains all of the evidence in the case.

It will be found that the only evidence offered was the bail bond itself. After this was offered the following occurred (Tr. 24):

"The court thereupon asked if there was anything else to be offered, and counsel for the Government stated that that was all. The court thereupon ordered that the forfeiture be made absolute and an order be prepared and submitted.

"Thereupon counsel for defendant asked how the matter had been disposed of, whether on the demurrer or the evidence; to which the court replied that counsel for the Government had introduced in evidence the bond and the court stated that he decided the case on both the evidence and the demurrer * * * *."

Generally: Scire facias, so far as the federal courts are concerned, is a new and independent action. The writ is the complaint, and the defendant must answer. Plaintiff must prove his cause with competent evidence and must put in evidence records on which he relies. The records are not parts of the scire facias proceeding (Cases cited later).

A. From an examination of the bill of exceptions it is at once apparent that there was *no proof whatsoever* that there was any "judgment and order of this court (district court) previously entered against said defendant (Unverzagt) discharging a writ of habeas corpus and ordering his removal to the U. S. District Court * * * * for New York" (Tr. 2).

Rule 33 of this court provides for the giving of bail in habeas corpus proceedings as follows: "2.

Pending an appeal from the *final decision* of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court * * * *."

Proof of a final order was necessary.

Proof of this fact was essential. Unless such order or judgment was placed in evidence the trial court could not say that the defendant had made any default. How can this court, from the evidence submitted, say there was any such order? How can it say that the defendant failed to obey such orders if they were not put in evidence? The Government was bound to prove these facts by placing in evidence the original or duly authenticated copies of the record—without proof of such facts the plaintiff's case failed. (Authorities are cited later, p. 39.)

The alleged judgment and order were not offered in evidence because they never existed.

B. No proof whatsoever that the defendant was ever called on May 13, 1925, or at any other time. That Unverzagt was called on May 13, 1925, or at any other time, was vigorously denied (Tr. 5).

(1) *This must be proved;* (2) *it can only be proved in one way—by the production of the records.*

Dillingham v. U. S., 7 Fed. Cas. No. 3913;

U. S. v. Rundlett, 27 Fed. Cas. No. 16208;

Note in 5 L. R. A. (N. S.) 402;

State v. Dorr, 5 L. R. A. (N. S.) 402, 53 S. W. 120;

Brooks v. U. S., 27 Pac. 311;

3 R. C. L. 62, Sec. 75;

Hunt v. U. S., 61 Fed. 795;

Nelson v. State, 73 S. W. 398.

Extensive quotations from cases showing the necessity of proof that the defendant was called have heretofore been made at p. 16-18 herein.

The rule is well summarized in 3 R. C. L. p. 62, Sec. 75:

> "The calling of the accused and the entry of the default of record appear to be preliminary requisites of the forfeiture of a recognizance * * * *. The reason for insisting upon these formal requisites has been placed upon the ground that they constitute *necessary evidence* in a proceeding to recover on the bond. The effect of the condition in the recognizance being such that it is not broken by non-appearance generally, to be proved by any evidence, but only by non-appearance in answer to a call, *to be proved by an entry made on the minutes of the court*, and returned as a part of the proceedings, a declaration in the suit must aver that the prisoner was called into court and his default judicially declared."

Hollister v. U. S., 145 Fed. 773, contains a complete discussion of scire facias. It is there laid down that the record on which the case issues is not a part of the case but is evidence which must be introduced to prove the case. In that case it is said, after discussing Supreme Court decisions, at p. 780:

> "From the principles announced in the foregoing authorities certain conclusions inevitably follow: First, *the record* upon which the writ issues is not a part of the declaration. *It is the evidence* on which plaintiff must rely to prove the case, and the legal sufficiency of the declaration must be determined, as in ordinary cases of pleading, from the consideration of its averments."

The court then points out, p. 781, that the records must be offered in evidence to prove the facts alleged, saying:

> "The record, when offered to prove the case, must disclose them or the case fails."

It was further held that on a denial the case presents a question of fact requiring a trial by jury.

In *Hunt v. U. S.,* 51 Fed. 795, an action of scire facias on a bail bond, the question arose as to how to prove the allegations of the writ. The court held:

> "A writ of scire facias, when issued, should only recite facts disclosed by the records and files of the court from which the writ eminates. Therefore, when the defendants named in the writ of

scire facias, by way of defense thereto, deny any of its recital, it is incumbent on the plaintiff to verify the same *by producing the records and files, and the facts in question cannot be otherwise proven.* * * * *."

In *Nelson v. State,* 73 S. W. 398, the syllabus reads:

"In scire facias on a forfeited bail bond it is essential that the judgment *nisi* be introduced in evidence."

To the same effect are *McWhorter v. State,* 14 Tex. Ap. 239; *Baker v. State,* 17 S. W. 256; *General Bonding etc. v. State* (Tex.), 165 S. W. 615.

In *Morsell v. Hall,* 14 L. Ed. 117, the Supreme Court, in considering the papers properly before the court on scire facias proceedings, holds that the various parts of the record not introduced in evidence should not be made part of the transcript, saying:

"And the proceedings upon the motion to discharge the bail form no part of the legal record in the proceedings on scire facias and ought not to have been inserted in the record and transmitted to this court."

In 35 Cyc., p. 1158, discussing scire facias, it is said:

"Plaintiff is bound to show that he is entitled to maintain the writ * * * *. Strictly speaking, no evidence can be heard on scire facias other than the record declared on * * *. Profert of the

record must be made in scire facias. Profert of books in the clerk's office is not sufficient."

In 6 Corpus Juris, discussing proceedings on forfeited bail bonds, it is said, p. 1071:

"On a general denial the burden of proof is on the state and not on the defendant * * * *.

"In actions upon forfeited recognizances or bonds, the affidavit, indictment, or information is admissible in evidence. It is also proper to admit in evidence in an action upon such an instrument, the bond or recognizance itself, provided the execution of the bond is known and provided it is properly filed. It is also proper to admit in evidence the sci. fa., the record on which it is issued, and the judgment transcript or the minutes of the court or the magistrate. But the record is an entirety, and it is error to reject a part thereof, except that the record of the proceedings subsequent to the forfeiture may be included."

At p. 1072 it is said:

"The weight and sufficiency of the evidence in an action on a bail bond or recognizance is governed by the rules regulating the weight and sufficiency of the evidence in civil cases generally. The proof may be sufficient to render the cognizors liable without offering the indictment or showing that it was ever found; but the bond or recognizance must be produced under a general denial, and the production of the bond proves its execution so that judgment may be rendered thereon, provided it is produced in a form which proves itself. The recognizance and judgment of forfeiture are held to be competent and sufficient evidence, under appropriate averments, to authorize a judgment for the state; but such bond or

> recognizance and judgment must be proved, and also a breach of the bond must be proved by the evidence of the defendant being called and neglecting to appear."

SUMMARY—The plaintiff's action, therefore, fails for lack of proof that the defendant was ever called.

C. *No proof that the defendant failed to appear, if actually called, to abide by the order of the court.*

The writ (Tr. 2) alleges that Unverzagt "came not but made default." This is vigorously denied. (Tr. 5, 7, 8).

If it were conceded that the defendant was called, still there is no evidence whatsoever in the record that Unverzagt did not appear, or that he defaulted. The bill of exceptions is absolutely silent upon this subject. Can this court say from any of the evidence submitted that Unverzagt did not appear,—that he defaulted?

The plaintiff had the burden of proving this fact as shown by the cases cited above, it was a necessary allegation and likewise necessary element of proof. Without proving that Unverzagt failed to appear, no judgment could be entered on his bond.

D. (1) *No proof that the order (if any) appealed from was affirmed, and* (2) *no proof of the order, if any, made by the Circuit Court on appeal.*

It is alleged (Tr. 2) that the (claimed) order appealed from was affirmed, but there is not one scintilla of evidence to prove this assertion. That was a part of the plaintiff's cause. Plaintiff should have placed said affirming order, or a proper copy, in evidence so this court could see such was the fact.

Rule 33 of this court, governing recognizances, provides that pending an appeal and final decision of any court, discharging the prisoner, he shall be enlarged upon recognizance with surety "for appearance *to answer the judgment of the appellate court.*" Consequently, it is necessary that the judgment of the appellate court be placed in evidence in order that it can be determined whether or not any order was made requiring the defendant to appear and answer the judgment of the *appellate court.*

Proof of this fact cannot be left to surmise and speculation.

E. *No proof of the judgment nisi.*

All of the authorities hold it essential to prove the judgment nisi, by placing in evidence a proper copy of the record, if there be any. Judgment nisi is the basis of the action. Without proof of that record the action fails. Certainly none was offered

in evidence here. (See cases cited above. Also *General Bonding Co. v. State,* 165 S. W. 615, *McWhorter v. State,* 14 Tex. Ap. 239).

F. *No proof (nor allegation) that the surety was called to produce the defendant.* The bond (Tr. 25) is joint and several. Therefore, the surety must be called, and this fact must be both alleged and proved.

In 3 R.C.L. p. 62, sec. 75, it is said:

> "Where the recognizance in its form is several rather than joint, it seems that it is necessary that each recognizance, namely, that of the principal, shall be separately forfeited in the usual manner. The principal should be called to appear, and the bail should be called to bring forth the body of the principal whom he undertook to have there that day, to forfeit his recognizance."

G. No proof of authority under or by which the bail bond was given.

It is always essential that plaintiff's scire facias proceedings allege and prove that the bond was given pursuant to some lawful authority. Here the plaintiff should have proved some order by a court or officer of competent jurisdiction, fixing or allowing the bail bond.

This is particularly true in habeas corpus, as the condition of granting bail is specifically prescribed

in *Rule* 33 of this court, which rule is above quoted. That rule requires allowance of bail only *after "final decision."* Proof of a final decision was therefore necessary.

IV.

FATAL VARIANCE BETWEEN ALLEGATIONS AND PROOF

A. *The bond sued upon in the writ is not the bond proved.*

The writ (Tr. 2) alleges that Unverzagt and appellant gave a bond, "which said bond and recognizance was conditioned for the appearance of said defendant before the U. S. District Court . . . at . . . Seattle, and from time to time and term to term thereafter, to abide by and obey a judgment and order of this court (district) previously entered against said defendant, discharging a writ of habeas corpus and ordering his removal to the U. S. District Court for . . . New York."

The appellant denied that such was the condition of the bond (Tr. 5). The bond put in evidence (Tr. 25-27) has an entirely different condition. It reads (Tr. 26):

"Now, therefore, the condition of this obligation is such that (1) if the said Charles H. Unverzagt shall appear either in person or by attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court, and (2) shall prosecute his appeal and (3) shall abide by and obey the orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and (4) shall surrender himself for execution of the judgment and decree appealed from as said court (Circuit) may direct if the judgment and order against him shall be affirmed or the appeal is dismissed; and (5) shall abide by and obey all orders made by said court or by said district court, *provided* the judgment and order against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then this obligation shall be null and void; otherwise to remain in full force and virtue."

Thus the condition of the bond sued on is entirely different from the conditions of the bond proved. This is of the highest importance, for, as shown hereafter, the defaults claimed were defaults made under the bond sued upon, but not defaults under the bond proved. As shown, the condition declared upon is not the condition prescribed by Rule 33, for appeal bonds in habeas corpus, *but* the condition of the bond proved is in accordance with the provisions of Rule 33.

Such a variance is fatal. 6 *C. J.* 1070; 35 *Cyc.* 1158.

B. *The defaults claimed in the writ are not defaults under the conditions of the bond proved.*

The writ (Tr. 2) alleges a bond with a certain condition, to-wit: Conditioned for the appearance of the defendant before the *district* court to obey an order of the *district* court previously entered. The writ then alleges facts from which a default is claimed, to-wit: (Tr. 2) the *district court* called Unverzagt on May 13th, 1925, that he came not and made default by failing to appear to answer the order of the district court previously made.

Examining the bond proved and comparing it, condition for condition, with the defaults alleged (though not proved) we find that the defaults alleged are not conditions of the bond proved:

(1) The condition of the bond proved is as follows (Tr. 26):

> "Now, therefore, the condition of this obligation is such that (1) if the said Charles H. Unverzagt shall appear either in person or by attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court."

There is neither allegation, claim nor proof that Unverzagt did not so appear before the Circuit Court.

(2) "Shall prosecute his appeal."

Again there is no claim that Unverzagt did not prosecute his appeal.

(3) "And shall abide by and obey the orders made by the Ninth Circuit Court of Appeals for the Ninth Circuit in said cause."

There is no allegation in the writ that the *Circuit Court* made any order, nor that Unverzagt failed to abide by any order of the Circuit Court. The claim is that Unverzagt failed to abide by an order of the *district court, but,* such was not the condition of the bond as given, *nor* is such the condition required by Rule 33, which provides, as above quoted, that "pending an appeal from the final decision . . . the prisoner shall be enlarged upon recognizance, with surety, *for appearance to answer the judgment of the appellate court.*" There was, therefore, no breach alleged which the bond covers. In other words, the plaintiff apparently mistook the condition of the bond to be one to answer orders of the district court, and not the Circuit Court. These things demonstrate the necessity of proving the order of the Circuit Court, if any was made.

In *U. S. v. Murphy,* 261 Fed. 751, (8CCA) the court had before it an almost identical situation. In that case an appeal bond conditioned that the defendant answer the orders of the *Circuit Court,* as did the bond here in question. The bond there was given on appeal as provided by a rule of court. The court there held that under such a bond the defendant was not required to abide by any orders of the district court, and that his sureties could not be held for any failure to abide by an order of the district court, the court saying, at p. 754:

> "The obligation of these defendants, as stated by the plain terms of the bond, does not extend to an undertaking on their part that Lew Moy and Sam Hee shall appear and obey the orders *of the trial court* and appear at the next regular term of the trial court, after the mandate of this court was sent down, for re-trial therein. This is not one of the conditions set forth in the bond in question, and there is no undertaking upon the part of these defendants that the principal shall appear at the trial court to which this case was remanded to await its action.
>
> It is suggested that the covenant on the part of the defendants that their principals would 'abide by and obey all orders made by the said Circuit Court of Appeals for the Eighth Circuit in said cause' by implication required the principal to appear for re-trial in the U. S. District Court for the district of New Mexico, at the next general term thereof, or pursuant to an

order of the trial court. It is admitted that the bonds do not comply with Rule 45. It is admitted that there is no covenant that the principal shall obey the orders of the trial court in the event of reversal or that they shall appear for re-trial. An interpretation of these bonds to imply such a liability on the part of these sureties would be to impose a liability upon them which cannot be found in their obligation, and their duty and obligation would thereby be extended beyond the plain terms of the instruments themselves. . .

The Circuit Court of Appeals for the Eighth Circuit made no order that has not been obeyed by both Lew Moy and Sam Hee, and when this court reversed the judgment and sentence against them, and ordered a new trial, the obligation of the sureties as given by them was fully performed, and the judgment of the trial court is affirmed."

(4) "or, shall surrender himself in execution of the judgment and decree appealed from as said court (Circuit) may direct if the judgment and order against him shall be affirmed, or the appeal is dismissed."

The writ does not allege that the *Circuit Court* made any order or "directed" that Unverzagt surrender himself in execution of the judgment appealed from; *nor* does the writ allege that Unverzagt failed to obey any order or direction *made by the Circuit Court; nor* was there any proof that the Circuit Court made any order which Unverzagt had failed to obey;

nor was there any proof that the Circuit Court made any order. The answer repeatedly denies that Unverzagt defaulted or failed to abide by any order which he was by his bond bound to obey.

The writ proceeds on the theory (Tr. 2) that the bond was conditioned for appearance before the *district* court to answer its orders previously made, and that Unverzagt made default by failing to answer some order of the *district* court. This is similar to the mistake made in *U. S. vs. Murphy,* 261 Fed. 751.

As shown, however. such was not the condition of the bond—nor was it the condition required by law under Rule 33.

> (5) "and shall abide by and obey all orders made by said court (Circuit Court), or by said district court, *provided* the judgment and order against him shall be *reversed* by the United States Circuit Court of Appeals for the Ninth Circuit."

The writ (Tr. 2) itself alleges that the order appealed from *was not reversed,* but affirmed. Very clearly this provision of the bond was thus applicable only to *reversal,* and not on an affirmance. However, the plaintiff has erroneously proceeded on the theory that this provision that Unverzagt obey orders made by the district court is applicable when the judgment

was affirmed, for, as above shown, the writ claims a default by reason of Unverzagt's failure to obey an order of the *district court* after the judgment was affirmed, not reversed.

The bond conditions contains two main provisions separated by semi-colons. The first relates solely to orders of the Circuit Court in the event the judgment is affirmed. The second relates to the district court only when the judgment is reversed.

Thus, the bond was in strict conformity with Rule 33, and does not cover, nor was it required to cover, the contingencies pleaded by plaintiff as defaults.

The court having decided the case on the merits, and the proof being utterly insufficient and opposed to the allegations of the writ, the judgment should be reversed and the cause dismissed.

C. "Property bond." The writ repeatedly refers to the property bond; for example (Tr. 2-3), it is alleged that the "property bond" was forfeited, and (Tr. 3) "commanded to show cause why the property bond should not be paid." The bond produced was a "corporate surety bond." It may well be that the bond given in the second case above referred

to, which was in fact a "property bond" with individual sureties (Casey and Pendleton), contains the provisions set forth in the writ, and, as set forth in the second affirmative defense (Tr. 7), was the bond intended to be proceeded against. At any rate, the bond produced was not a "property bond," nor was it conditioned as claimed.

The action should be dismissed for failure of the proof to conform with the allegations of the writ as to the conditions of the bond and defaults under the bond.

THE BOND SUED UPON IS UTTERLY VOID BECAUSE NO *FINAL* ORDER WAS EVER MADE.

V.

The writ alleges (Tr. 1-2) that the bail bond was executed and filed May 9th, 1924, and conditioned to obey an order previously entered dismissing a writ of habeas corpus and ordering Unverzagt's removal to New York. The answer denies that any such order was ever entered, and, as pointed out, no such order was proved by plaintiff.

Minute entry only. On the contrary the only order made was a *minute* entry of May 7th. From the

facts already stated it will be recalled that Unverzagt was arrested at Blaine on May 5th, 1924; that on May 6th he sued out a writ of habeas corpus returnable May 7th (see journal entry Tr. 28). On May 7th the cause came on for hearing and the following occurred (Tr. 28):

> "Now on this 7th day of May, 1924, this cause comes on for hearing on petition for writ of habeas corpus which is argued and writ will be discharged. Bond on appeal is fixed at $10,000.00 and an order of removal is granted in default of $10,000.00 bail. Motion to stay proceedings is granted to Friday A. M. *for entry of final order.*"

This oral announcement, of course, did not state *how, when or to where* the defendant was to be removed, and obviously was not sufficiently definite to form the basis of an appeal. Consequently, it was provided that a *"final order"* should be entered on *"Friday"* May 9th. However, no such *final* written order was ever entered, but on Friday, May 9th, the bond here in question was filed and an attempted appeal was taken direct from the minute entry of May 7th. (See order denying new trial, Tr. 16-17).

A. *Under such circumstances the bond was utterly void.*

(1) The Circuit Court of Appeals' jurisdiction is limited to a review of "final decisions in district courts." U. S. Comp. Stat. Sec. 1120; Judicial Code Sec. 128.

> "The Circuit Courts of Appeals shall exercise appellate jurisdiction to review on writ of error *final decisions* in the district courts . . ."

(2) The authority to grant bail in habeas corpus cases is confined to "an appeal from a *final decision* of any court or judge," Rule 33, Circuit Court of Appeals, Sec. 2 and 3.

(3) a. The order in question was on its face not a final order because provision was made for the entry of a final order. Moreover, it was too indefinite to constitute a final order.

b. By General Rules 64 and 65 of the district court of Washington, all decrees in equity and judgments at law must be in writing and signed by the court. Rule 65 provides:

> "Judgments in actions by law must be signed by the judge. It shall be the duty of the clerk, unless otherwise ordered by the court or the judge, to enter such judgments in the judgment book . . ."

A MINUTE ENTRY IS NOT SUFFICIENT TO SUPPORT AN APPEAL—FINAL JUDGMENTS MUST BE ENTERED.

Herrick v. Cutheon (CCA) 55 Fed. 6;

Herrup v. Stoneham, 15 Fed. 2nd, 49; (CCA)

Darling Lumber Co. v. Porter 256 Fed. 455; (CCA)

In re Christensen's Estate, 77 Wash. 629;

Day v. Mills, 213 Mass. 585, 100 N. E. 1113;

Trammell v. Rosen (Tex.) 157 S. W. 1161;

Hill v. Hill (Ala.), 100 So. 340.

In *Herrick v. Cutheon,* 56 Fed. 6, it appears that the court entered a written opinion (52 Fed. 47) sustaining a patent, and finding it had been infringed, and concluding with the words "decree for complainant." Thereupon, and before any decree was entered, defendant appealed. The court held:

> "Whatever may be the practice of the circuit court as to drawing out decrees before they become effective as such, it is plain that the docket entry in this case containing only the words 'opinion—decree for complainant,' does not constitute a decree for an injunction required to give this court jurisdiction, nor can the docket entry be aided for that purpose by reference to the opinion. The appeal was taken prematurely and is dismissed."

In *Herrup v. Stoneham,* 15 Fed. 2nd, 49, it was said, at p. 50:

> "To be appealable, the decision or order must be 'not only final but complete,' and final 'not only as to the parties, but as to the whole subject matter and as to all of the causes of action involved.' " Citing cases.

In *Day v. Mills* (Mass.), 100 N. E. 1113, it was said:

> "A docket entry, or an order for a docket entry, is not a final decree . . . In such case no appeal will lie."

So also in the other cases cited.

WHERE NO APPEAL WAS ALLOWABLE NO ACTION CAN BE MAINTAINED ON THE APPEAL BOND.

Steele v. Crider, 61 Fed. 484;

U. S. v. Morris Heirs, 153 Fed. 240;

Pacific Nat'l Bank v. Mixter, 124 U. S. 721; 31 L. Ed. 567;

Brounty v. Daniels (Neb.) 36 N.W. 463;

Davis v. Huth, 43 Wash. 383; 86 Pac. 654;

Loudon v. Loudon, (Cal.) 218 Pac. 442;

Jones v. Jones, 233 Ill. App. 214;

Leonard, Admr. v. Cowling, (Ky.) 87 S. W. 812;

Calvert v. Wilder, 201 S. W. 449;

Pierson v. Republic Casualty, 142 N. E. 722 (Ind.).

In *U. S. v. Morris Heirs,* 153 Fed. 240, in a suit by the United States on an appeal bond, it appeared that the defendant had no right to appeal because the order in question was one reviewable only by writ of error. It was held that since no right of appeal existed, there was no consideration for the appeal bond, and hence no action could be maintained on it.

In *Steele v. Crider,* 61 Fed. 484, it was held that an appeal bond which was given in a cause in which no appeal lies creates no obligation, the court citing several Supreme Court cases in support of its decision.

In *Brounty v. Daniels* (Neb.) 36 N. W. 463, an appeal was taken after the announcement of a decision, but before the entry of a judgment, in other words, a *premature* appeal, just as in the case at bar. It was held that no action could be maintained on the appeal bond, the court saying p. 464:

> "In the proceedings now under consideration we find that the county judge in effect, rendered the findings and verdict upon the facts similar to what is required of a jury in a similar case.

> Nothing more can be claimed for it. This being done, it then remained for the county court to render judgment against the defendant, which *was not* done. The findings of fact is not a judgment. There being no judgment from which an appeal could be taken, it would seem to be clearly apparent that the appeal bond or undertaking referred to was a nullity, and that the decision (dismissing the action) of the district court thereon was correct."

In *Davis v. Huth,* 43 Wash. 383, 86 Pac. 654, it was held that no action could be had on an appeal bond where the appellate court did not acquire jurisdiction, for the reason that "the jurisdiction of this court on appeal was the sole consideration for the bond sued on in the case. There was no other consideration."

The court further held, 86 Pac. p. 656, "that the mere fact that the bond operated as a supersedeas until the cause was dismissed made no difference. The bond was a supersedeas on the account of the appeal and for no other reason or purpose."

So here, the bond was an appeal bond given pursuant to a rule of court governing appeals from "final decisions" in habeas corpus proceedings. If there was no "final decision" there was no right to appeal, and the bond was without consideration, and was void.

Result. The decision upon which the appeal was taken was not a "final decision"; it was not appealable to the Circuit Court. Hence the appeal bond was void and the judgment should be reversed.

V.

MOTION FOR NEW TRIAL

Each and every point raised in this appeal was presented specifically in the written motion for new trial (Tr. 13) which was denied, after hearing (Tr. 16).

SUMMARY.

We respectfully submit that the judgment of the lower court should be reversed, because

I.

The court erred in sustaining the demurrer to the answer:

A. The answer denies material allegations of the writ;

1. It denies the condition of the bond as pleaded;

2. It denies that Unverzagt was called;

3. It denies that Unverzagt made default;

B. Each of the four affirmative defenses pleaded states a good defense.

II.

The court erred in granting judgment for the plaintiff and in refusing to grant judgment for defendant:

A. The four affirmative defenses set forth in the answer are admitted and constitute a complete defense.

III.

The Government failed to prove the facts essential to establish its case:

A. No proof whatsoever that the district court made any previous order discharging the writ of habeas corpus and ordering removal;

B. No proof whatsoever that the defendant was called on May 13th, 1925, or at any other time.

C. No proof that the defendant failed to appear, if called.

D. No proof that the order appealed from was affirmed, and no proof of the order made by the Circuit Court on appeal.

E. No proof of the judgment nisi.

F. No proof that the surety was called to produce the defendant.

G. No proof of authority under which the bail bond was given.

IV.

Fatal variance between allegations and proof.

A. The bond sued upon in the writ is not the bond proved.

B. The defaults claimed in the writ are not defaults under the conditions of the bond proved.

C. The bond proved was not a "property bond," as alleged.

V.

The bond sued upon is utterly void because no final order was ever made.

A. The only order made was a minute entry.

B. Under such circumstances the bond was utterly void.

1. The Circuit Court has jurisdiction over final decisions only.

2. Bail is allowable in habeas corpus appeals from final decisions only.

3. Final decisions must be in writing.

C. A minute entry is not sufficient to support an appeal, but final judgment must be entered.

D. Where no appeal was allowable no action can be maintained on the appeal bond.

Respectfully submitted,

CALDWELL & LYCETTE,

Attorneys for Appellant.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5496

NATIONAL SECURITY COMPANY, a Corporation,

Appellant.

vs.

UNITED STATES OF AMERICA,

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HONORABLE JEREMIAH NETERER, *Judge*

Brief of Appellee

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Brief of Appellee

The statement of the case and the facts of the same are substantially those as set forth on pages two to seven of appellant's brief.

ARGUMENT

1

On page 16 of appellant's brief, it is contended that plaintiff herein was bound to prove breach of the condition of the bond by showing that the defendant was

called and did not appear. The Government's contention with reference to this point is that inasmuch as the judgment nisi was properly proven, the fact that the defendant did not appear and was called to appear is presumed. In the case of *Com. v. Fogel*, 3 Pa. Super. 566, it was held that the calling of the accused will be presumed from a record entry of forfeiture. At 6 *C. J.* 1070, we find the following statement:

"In an action on a forfeited bail bond or recognizance it will be presumed, in the absence of evidence to the contrary that the proceedings relative to the character of the bond or recognizance or to the adjudication of the forfeiture were regular and valid such as that the bond or the recognizance was taken by the proper authority legally empowered in the premises."

On page 1071, it is stated:

"The record of a forfeiture of recognizance is conclusive evidence of the breach and cannot be impeached by extrinsic evidence."

In *Fox v. Com.*, 81 Pa. 511, it was held that the entry of the forfeiture stands for proof of all the steps necessary to complete the forfeiture, including the fact that the bail and defendant were duly called and did not appear and answer.

In *Com. v. Basendorf*, 25 A. 779, it was held that an entry "recognizance forfeited" is conclusive that defendant and the bail were called and did not appear.

In *Burrall v. People*, 103 Ill. App. 81, it was held that the judgment of forfeiture and the recognizance are *proper* and *sufficient* evidence to sustain the judgment of absolute forfeiture.

It is therefore contended that the denial in the answer of the allegation in the writ of scire facias that the appellee was called did not raise an issue of fact and it was therefore not error for the trial court to sustain the demurrer to the answer in the case at bar. All that it was necessay for the Government to do in this case was to prove and offer the bond in evidence and prove the judgment nisi, and all the other steps antecedent to the absolute forfeiture will be presumed to have been properly taken.

The Government therefore submits that the denials as set up in pages fifteen to nineteen inclusive in appellant's brief as raising an issue of fact, did not raise any issue of fact at all and it was not error for the trial court to sustain a demurrer to the answer.

II

Appellant, on pages 19 and 20 of his brief, contends that the first affirmative defense in the answer consti-

tutes a good defense. It will be seen that the first affirmative defense alleges in substance that the defendant Unverzagt was first arrested at Blaine, Washington, on May 7, 1925, on a fugitive warrant based on two indictments against him in New York, and habeas corpus proceedings were instituted to test the legality of his arrest. It was alleged in the first affirmative defense that it was in this first proceeding that Unverzagt gave the bond here in question as an appeal bond to obtain his liberty while an appeal was pending on the first habeas corpus proceedings. The affirmative defense then alleges that while the first habeas corpus proceeding was still pending, the defendant Unverzagt was arrested a second time on one of the same New York indictments upon which he was arrested the first time. On the second arrest, it is alleged in the first affirmative defense, he again instituted habeas corpus proceedings, and on the writ being discharged he appealed to this court and pending appeal obtained his release upon a second and entirely new $10,000 property bond with new sureties, and it is further alleged that said appeal was to test the legality of the arrest on one of the indictments said defendant had been originally arrested on at Blaine, Washington; and it is alleged further in said first affirmative defense in said answer,

that said second arrest was on the same charge on which Unverzagt was originally arrested and that said property bond superseded and took the place of the aforesaid bail bond previously executed by this surety. (Tr. 6).

To sustain his contention that the first affirmative defense mentioned above constituted a good defense, appellant cites various cases wherein it is stated that the rule of law is that a re-arrest on the same charge releases the bail. The Government concedes this to be the law but submits that it is not applicable in the present case. The rule as laid down by appellant in his brief on pages twenty and twenty-one is not applicable where the re-arrest is under a second indictment although based on the same transaction as the first, 6 *C. J.* 1027, and cases cited therein. Nor are the former bail released when the new recognizance is before the same court and upon another charge which is part of the same transaction as that upon which the first recognizance was given, 6 *C. J.* 1030.

It is submitted that re-arrest in this case, as stated in the first affirmative defense, was a re-arrest on one of the New York indictments upon which the defendant Unverzagt was arrested the first time, but upon which

one of said New York indictments the second arrest occurred is not alleged in said first affirmative defense. It may not have been an arrest under the same indictment as the first arrest. The failure of the National Surety Company in this case to plead under which indictment the second arrest occurred renders the first affirmative defense demurrable.

On page twenty-two of appellant's brief, it is stated that the second affirmative defense is a good defense and is not demurrable. This defense in substance states nothing but conclusions and ambiguous matter too indefinite and uncertain to state any defense whatsoever to the cause of action pleaded in the writ of scire facias. The pleader in this second affirmative defense pleads nothing but conclusions in the mind of government officers as to what bond was intended to be forfeited in this proceeding. The allegations of this second affirmative defense are not admitted for the purpose of the trial by the interposing of the demurrer, but are admitted for the purpose of the hearing and argument of the demurrer only. It is therefore submitted by the Government that the second affirmative defense herein fails to state facts sufficient to constitute a defense to the cause of action alleged in the writ of scire facias herein. (Tr. 1).

The third affirmative defense is not a proper affirmative defense at all because it constitutes matters which are merely denials, and has no proper place in the portion of the pleading in which new matter and affirmative defenses are to be set up. The same is true with the fourth affirmative defense. Both the third and fourth affirmative defenses are merely repetition and do not state facts sufficient to constitute a defense to a cause of action pleaded in the writ of scire facias herein, and are therefore demurrable.

In *Frank v. Jenkins*, 11 Wash. 611, it was held that where affirmative matter in an answer simply amounts to a denial of the allegations of the complaint, no reply is necessary. It is the Government's position that no reply was necessary to either the third or fourth affirmative defenses on account of the fact that the same merely constituted denials, and that, in fact, no reply was necessary to any of the affirmative defenses which were pleaded in the defendant's answer on account of the fact that a demurrer was interposed to said answer and sustained during the trial of this case, and thus the necessity for serving and filing a reply in this case was obviated. It is also contended that inasmuch as all the Government had to prove to sustain a recovery was the bond in question and the judgment nisi, that the denials

in said answer, both in the general denials and in the affirmative defenses, did not raise issues of fact in the case at bar and constituted no defense to the cause of action pleaded in the writ, and that there was therefore no error to sustain the demurrer to said answer.

IV.

On page twenty-seven of appellant's brief, it is contended that the court erred in granting judgment for the plaintiff, and erred in refusing to grant judgment for the defendant (appellant).

An examination of the transcript and bill of exceptions in this case will reveal that at no time did the appellant herein make any motion for non-suit or for dismissal nor did he at any time place before the trial court by a proper request on motion the question of whether or not the evidence was sufficient to sustain the judgment. (Tr. 22-25).

It is contended on page twenty-eight of appellant's brief that the Government herein should have replied to the affirmative matter in the answer, and from pages twenty-eight to thirty-five, the contention of the appellant herein is set forth at great length as follows in substance: Inasmuch as the Government failed to re-

ply to the affirmative matter set up in the answer, and inasmuch as the Government demurred to the answer, all the allegations of the same are deemed to be admitted.

This is not the law, and never has been the law. When a demurrer is interposed to any pleading, it is true that the facts in the pleading demurred to are admitted for the purpose of the hearing on the demurred, but are not admitted for any other purpose whatsoever. In 31 *Cyc.* 337, we find the following pertinent statement with reference to this point, which we deem to be the law:

"The admissions by demurrer can be used only for the purposes of argument on demurrer, and they are not evidence for the party alleging the facts demurred to."

In the case at bar, if the Government had replied to the affirmative matter in the answer, it would have waived its right to demur to the same. It is a well-settled rule of law that where a demurrer is interposed to a complaint or an answer and then an answer to the complaint or a reply to the answer is served, that the demurred is waived. *Watson v. Kent,* 35 Wash. 21.

The appellant in this case is in effect contending that the Government herein should have filed a reply at the

time of trial and thus waived its right to demur to the answer. In *Ewing v. Van Wagenen*, 6 Wash. 39, it was held that a plaintiff is not called upon to reply to an affirmative defense while his demurrer to a special defense remains undetermined.

It is submitted that the appellant herein is not now in a position to state that the appellee admitted the allegations of the answer herein by failing to reply thereto, when no motion for judgment on the pleadings was made by the appellant herein at the time of trial. In other words, it is submitted that the appellant cannot at this time in the appellate court, say that the appellee herein admits the allegations of the answer when the question of whether or not a failure to reply to said answer constituted an admission of the same was never raised in the trial court. Decisions are legion to the effect that the Circuit Court of Appeals is not required to pass on questions not raised before the District Court. *National City Bank v. Carter*, 14 Fed. (2nd) 940.

In *Asplund v. Mattson*, 15 Wash. 328, it was held that a party when proceeding to trial without raising the objection that a reply constituted a departure from the cause of action set out in the complaint, waives his

right to urge the objection on appeal. *Remington's Compiled Statutes for the State of Washington*, 1922, Section 278, provides as follows:

"If the answer contains a statement of new matter constituting a defense, and the plaintiff failed to reply or demur thereto within the time prescribed by law, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it, he may have a jury called to assess the damages."

It will be seen that the above statute requires, on the failure of a plaintiff to reply to the answer, that the defendant move for judgment on the pleadings before the plaintiff will be deemed to have admitted the allegations of the answer.

In *Hester v. Stine*, 46 Wash. 469, it was held that an affirmative answer stating no defense requires no reply. The *Hester* case is analogous to the case at bar on account of the fact that the trial court in the present case held that the answer constituted no defense to the cause of action pleaded in the writ. Inasmuch as it was held that the answer constituted no defense, there was no necessity for reply to be filed by the plaintiff herein.

It has been stated herein that the demurrer only admits the allegations of the answer for the purpose of

argument on the same. However, for said purpose, the demurrer does not even admit the conclusions of the pleader. See *Thacher v. Aetna Co.*, 287 Fed. 484.

It will be seen by an examination of the affirmative defense included in the answer of defendant herein that the second, third and fourth affirmative defenses were wholly conclusions. It is, therefore, contended that the demurrer in the present case for the purpose of argument, did not even admit the allegations of said affirmative defenses, and that it was not error for the trial court to sustain a demurrer to the same. In *St. Louis K. & S. E. R. R. v. United States*, 267 U. S. 346, 69 L. Ed. 649, it was held that conclusions of law are not admitted even for the purpose of argument by a demurrer. It is therefore submitted that appellant's contention that the allegations in the answer were admitted by the demurrer and by the Government's failure to reply to said allegations, is without any merit or foundation and reason whatsoever.

V.

It is contended on page thirty-five of appellant's brief, that the trial court decided the case on the demurrer and also gave judgment on the merits.

This is not possible. The court either decided the case on the ground that the demurrer to the answer was well taken or on the ground that sufficient evidence was adduced to prove the case. The decision could not possibly have been made on both grounds legally, although there may be in the bill of exceptions herein some statement by the trial judge leading one to believe to the contrary.

When a demurrer is sustained, the facts alleged in the pleading demurred to are not in the case. 31 *Cyc.* 337, *Doolittle v. Branford*, 22 A. 336. When the trial judge sustained the demurrer in this case, this precluded him from deciding the case on the merits as far as the issues were concerned. The facts in the answer were not in the case after the sustaining of the demurrer. Therefore, it cannot be logically contended that the case was decided not only on the demurrer but also on the merits.

However, if it be contended that the case was decided on the merits, appellant cannot now question whether or not there was any evidence whatsoever to support the judgment. An examination of the bill of exceptions herein (Tr. 24) will disclose that after the demurrer was sustained and evidence adduced, and after the court stated that he had decided the case on both the

evidence and demurrer, no motion for dismissal or specific exception to the court's findings or specific request for findings was made. The rule is, that unless a specific finding is excepted to in the trial court, or a motion for dismissal on account of the insufficiency of evidence is made in a non-jury trial, the question of whether or not the evidence was sufficient to sustain the judgment cannot be raised in the appellate court. *Grainger Bros. v. Amsinck*, 15 Fed. (2nd) 329. In the *Grainger* case the court stated as follows:

"The assignments of error set out in the brief and argued present the single contention, namely, that special findings numbered 23 and 24 were not supported by substantial evidence.

"In *Wear v. Imperial Window Glass Co.*, 224 F. 60, 63, 139 C. C. A. 622, 625, this court said:

" 'When an action at law is tried without a jury by a federal court, and it makes a general finding, or a special finding of facts, the Act of Congress forbids a reversal by the appellate court of that finding, or the judgment thereon, 'for any error of fact.' (Revised Statutes, 1011, U. S. Comp. Stat. 1913, Par. 1672, p. 700), and a finding of fact contrary to the weight of the evidence is an error of fact.

" 'The question of law whether or not there was any substantial evidence to sustain any such finding is re-

viewable, as in a trial by jury, only when a request or a motion is made, denied, and excepted to, or some other like action is taken which fairly presents that question to the trial court and secures its ruling thereon during the trial. * * * An exception to any ruling which counsel desires to review, which sharply calls the attention of the trial court to the specific error alleged, is indispensable to the review of such a ruling.'

"See, also *First National Bank of Ardmore v. Litteer* (C. C. A. 8) 10 F. (2d) 447.

"At the trial below, counsel for Amsinck & Co. did not by specific exception to the findings, by request for additional findings, or by motion or other like action, challenge the sufficiency of the evidence to support the findings, and did not sharply call to the attention of the trial court the alleged error which it now urges. It follows that the matters assigned as error are not open to review here.

"The judgment is therefore affirmed."

In the *City of Sidalia v. Chalfont*, 4 Fed. (2d) 350, it was held that a question not raised in the trial court cannot be considered on appeal.

In *Blumenfeld v. Mogi*, 295 Fed. 123, it was stated as follows:

"In order to present for review the question as to whether or not the evidence is sufficient to support the

judgment of the court, the complaining party must as a predicate before the judgment is rendered and during the progress of the trial, move the court for judgment in his favor. If he fails so to do, even though he excepts to the judgment after its rendition the appellate court is without power to review the sufficiency of the evidence set out in the bill of exceptions to support the judgment excepted to. The reason of the rule is that in such a case there is no ruling during the progress of the trial to be presented for review. As in the case of a judgment upon the verdict of a jury, an exception to the judgment after it has been rendered presents nothing for review. *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608; *Insurance Company v. Folsom*, 18 Wall. 237, 21 L. Ed. 827."

In the case of *Bank of Waterproof v. Fidelity & Deposit Company of Maryland*, 299 Fed. 478, certiorari denied, 45 S. Ct. 98, it was held that to secure review of evidence by the appellate court in a trial by court without a jury under a written stipulation waiving a jury, the appellant must have moved for judgment and excepted to the court's refusal thereof; exception to the judgment alone not presenting anything for review.

It will therefore be seen that on account of the fact that the appellant in the present case failed to move for a dismissal below on account of the insufficiency of the evidence, he cannot now in the appellate court question

the sufficiency of the same to sustain the judgment entered. To the same effect, see *McFarland v. Central National Bank*, 26 Fed. (2d) 892; *Southern Surety Company v. United States*, 23 Fed. (2d) 55.

On page thirty-seven of appellant's brief, it is stated that there was no proof whatsoever that there was any judgment and order of the District Court discharging the writ of habeas corpus and ordering Unverzagt's removal to the federal court.

In the order denying motion for new trial (Tr. 17) it will be seen that the following entry was made in the order denying motion for new trial therein:

" 'May 7, Ent. record hearing on writ. Writ to be discharged, appeal bond fixed at $10,000.00 and order of removal granted in default of bail, and motion for stay of proceedings granted until A. M. Friday for entry of final order'; that petition for appeal was filed on May 9th, and order entered allowing the same; and it further appearing that all the parties treated said order and minute entry of May 7th as a final order, and the court being of the opinion that the petition for rehearing should be denied. Now, therefore,

"IT IS HEREBY ORDERED that the National Surety Company's petition for new trial and rehearing be and the same is hereby denied.

"To which the defendant, National Surety Company, excepts and exception is hereby allowed.

"Done in open court this 28th day of June, 1927.

"JEREMIAH NETERER, Judge."

In the above order denying petition for new trial it appears that the court was cognizant of and aware of the fact that he had discharged the writ of habeas corpus and ordered the defendant Unverzagt removed, although apparently no final order was entered. It will also appear from said order denying appellant's motion for new trial herein that all the parties at the hearing on said motion for new trial considered the minute entry set forth above in said order denying said motion for new trial as a final order.

VI.

On pages thirty-eight to forty-three of appellant's brief, it is contended that there is no proof whatsoever that the defendant Unverzagt was called and failed to appear.

An examination of the bill of exceptions in this case (Tr. 23) will show that the clerk testified that the defendant Unverzagt was called in May, 1925, and that forfeiture was made on May 13, 1925, according to the

docket. This, it would seem, is sufficient to prove that the defendant Unverzagt defaulted, failed to appear, and was called. In *Com. v. Fogel*, 3 Pa. Super. 566, it was held that the calling of the accused will be presumed from a record entry of forfeiture. In *State v. Holtdorf*, 61 Mo. App. 515, it was held that the defendant or sureties need not be called prior to forfeiture inasmuch as they should know when they are supposed to be in court.

"The record of the forfeiture of a recognizance is conclusive evidence of the breach and cannot be impeached by extrinsic evidence." 6 *C. J.* 1071.

In *Fox v. Com.*, 81 Pa. 511, it was held that the entry of the forfeiture stands for proof of all the steps necessary to complete the forfeiture, including the fact that the bail and defendant were duly called and did not appear and answer.

In *Com. v. Basendorf*, 25 A. 779, it was held that:

"An entry 'recognizance forfeited' is conclusive that defendant and the bail were called and did not appear."

It has also been held that the recognizance of record and the judgment of forfeiture are *competent* and *sufficient* evidence under appropriate averments in scire

facias to authorize judgment of execution according to the form, force and effect of the recognizance. *Burrall v. People*, 103 Ill. App. 81.

The appellee herein submits, in view of the fact that the bill of exceptions shows judgment nisi and shows that the defendant was called, that the trial court did not err in granting judgment for the Government herein. It is submitted that the fact that the defendant failed to appear and defaulted will be presumed after the judgment nisi has been proven.

At this time, we wish to call to the Court's attention Section 2235, *Remington's Compiled Statutes for the State of Washington*, 1922, which provides as follows:

"Action on Recognizance not to be Barred, etc.—No action brought on any recognizance given in any criminal proceeding whatever shall be barred or defeated, nor shall judgment be arrested thereon, by reason of any neglect or omission to note or record the default of any principal or surety at the time when such default shall happen, or by reason of any defect in the form of the recognizance, if it sufficiently appear, from the tenor thereof, at what court or before what justice the party or witness was bound to appear, and that the court or magistrate before whom it was taken was authorized by law to require and take such recognizance; and a recognizance may be recorded after execution awarded."

In view of the above statute, it would seem that the omission to note the default of the defendant of record would not effect the validity of the bond forfeiture proceedings. It would seem, also, that all the other minor defects of the bond forfeiture proceedings, if any, are to be disregarded.

On page forty-five of appellant's brief, it is contended that there is no proof or allegation that the surety was called to produce the defendant.

The Government's answer with reference to this contention is simply that it is not now, nor never has been, necessary to call the surety to produce the defendant, or even necessary to give the surety notice to produce the defendant.

In support of appellant's contention, he cites a quotation from 3 *R. C. L.*, page 62, Section 75, which states in substance that where a recognizance is in form several rather than joint, it is necessary to call the surety. Such citation, however, is not applicable here. The bond, in the first paragraph, states that the principal and surety obligate themselves jointly and severally (Tr. 25). In *Southern Surety Company v. United States*, 23 Fed. (2d) 55, it was held that it was no defense to the forfeiture that the surety was not called

to produce the principal or that the bond was not forfeited at all as against the defendant surety. At 6 *C. J.* 1046, we find the following statement:

"It has been held that if there has been a default on the part of the principal, he is the only one to be called and notified, and that a forfeiture of the recognizance may be declared or entered without calling the sureties and without previous notice to them unless such notice is required by statute. It has also been held that no notice need be given the surety to produce the principal on the day the bail is forfeited."

The Government therefore submits that it was not necessary to prove that the surety was called to produce the defendant.

VII

At the bottom of page forty-five of the appellant's brief, it is stated that there is no proof of authority under or by which the bail bond was given. It is further stated on the same page, that it is essential that plaintiff's scire facias proceedings allege and prove that the bond was given pursuant to some lawful authority.

Assuming, but not conceding that plaintiff's writ of scire facias in the instant proceedings, is defective for failure to allege that the bond is given pursuant to some lawful authority, the appellant herein failed to move

against said writ or to demur to the same or to attack the validity of the same in any manner whatsoever in the trial court. He has therefore waived his right to have the insufficiency of the writ considered on appeal.

In 6 *C. J.* 1070, we find the following pertinent statement with reference to this point:

"In an action on a forfeited bail bond or recognizance, it will be presumed, in the absence of evidence to the contrary, that the proceedings relative to the taking of the bond or the recognizance, or to the adjudication of the forfeiture were regular and valid, such as that the bond or the recognizance was taken by the proper authority legally empowered in the premises."

An examination of the answer of the surety company herein (Tr. 4 to 8) will disclose that in no place did the appellant herein deny, or allege affirmatively, that there was no order of a court or officer of competent jurisdiction, fixing or allowing the bond. In the absence of such a denial, or evidence on the part of the appellant herein that there was no such order fixing or allowing the bail, it will be presumed that the bond was given pursuant to lawful authority.

VIII

On page forty-six of appellant's brief, it is stated that there is a fatal variance between the allegations

and the proof, and that the bond sued upon in the writ is not the bond proved. However, the appellant in this case has waived his right to rely on a variance between the bond alleged and the bond proven, on account of the fact that there was no objection on the part of the appellant herein to the admission of the bond in evidence when said bond was offered in evidence by the Government. (Tr. 23). If there is a variance between the bond proven and the bond alleged, the defendant waives the variance and acknowledges the same as not fatal by failure to object to the bond at the time it was offered in evidence. *Wellborn v. People*, 76 Ill. 516; 6 C. J. 1073.

In *Lewis v. State*, 39 S. W. 570, it was held that an objection that there is a variance between the bond and the recitals in the writ of scire facias is waved unless there is an objection to the admission of the bond into evidence.

It is contended, on the part of the Government, that the covenant in the bond in the case at bar (Tr. 25), which provides that the defendant Unverzagt would obey the orders of the Circuit Court of Appeals, and surrender himself in execution of the judgment and decree appealed from if the Circuit Court shall affirm the

order appealed from, required by implication the appearance of the defendant Unverzagt before the lower court when mandate from the upper court was sent down affirming the case.

The case of *United States v. Murphy*, 261 Fed. 751, (8 C. C. A.), cited in appellant's brief on page fifty, is not in point on account of the fact that the court held in that case that the covenant on the part of the surety that the defendant would appear and abide by all orders made by the Circuit Court of Appeals did not require the appearance of the defendant for re-trial in the District Court. It will be seen at once that in the *Murphy* case the conditions of the bond and the facts of the case are not parallel to the facts in the case at bar.

It is contended by the Government that the fact that the bond sued on in the writ of scire facias was described in one portion of the writ as a property bond, was immaterial on account of the fact that, at the outset, in the first paragraph of said writ (Tr. 2), the National Surety Company is mentioned as the surety on the bond in question and it is believed that the court may take judicial cognizance that a well-known surety company, such as the National Surety Company, does not deal in property bonds.

IX.

It is contended by the appellant that the bond sued upon is utterly void because no final order was ever made. It will, however, be seen by an examination of the order denying motion for new trial herein (Tr. 17) that all the parties considered the order of the court discharging the writ and ordering the defendant removed, entered on May 7th, which was a minute entry, as a final order.

It is also contended by the appellant that inasmuch as there was no final order, no appeal was properly allowed on account of the fact that an appeal must be from a final judgment. This contention, however, can not be taken seriously on account of the fact that all the parties at the time the writ was discharged, considered the minute entry as a final order, as appears more fully from the order denying the motion for new trial herein (Tr. 17).

Counsel's contention, also, that no appeal was properly allowable in the instant case is without merit because the Circuit Court for the Ninth Circuit assumed jurisdiction in this case and affirmed the judgment of the lower court which discharged the writ of habeas

corpus. *Unverzagt v. United States*, 5 Fed. (2d) 494. Counsel for the appellant cites many cases on pages fifty-eight, fifty-nine and sixty in substantiation of his contention that where no appeal was allowable, no action can be maintained on the appeal bond.

The Government concedes this to be the rule where the appeal was dismissed prior to the Circuit Court taking jurisdiction of the case. In the case of the dismissal of an appeal, no action can properly be taken on an appeal bond on account of the fact that there is no consideration for said bond. However, where the appeal has not been dismissed and is improperly taken and improperly allowed, but the upper court takes jurisdiction, the appeal bond is valid and an action on the same is maintainable because there is consideration for the same and the principal has been released in consideration of the execution of the bail bond, and even though the upper court holds the appeal is improper the surety is still liable on the appeal bond. In the case at bar, the Circuit Court assumed jurisdiction of the case, and assuming, but not conceding that it now appears that the appeal was not properly allowable, still an action may be properly maintained on the appeal bond for failure of the defendant Unverzagt to obey the orders of the trial court. In the present case the ap-

peal was not dismissed prior to the taking of the jurisdiction of the case by the upper court as was the case in the numerous citations cited by counsel for appellant on pages fifty-eight, fifty-nine and sixty of his brief.

By executing an appeal bond and thereby in effect obtaining the contemplated benefits pending the disposition of the appeal, the parties may estop themselves from asserting certain defenses to liability upon the bond. The general principle is that the obligors are estopped from denying their liability when the bond has subserved the purpose for which it was given and appellant has had the benefit of it. 4 *C. J.* 1269.

"An appeal bond is not void because the judgment appealed from is void, and the appeal was taken to a court without jurisdiction." *Tanquary v. Bashor*, 94 Pac. 22.

In this case the court stated:

"It is conceded here, and the record so shows, that the effect of the giving of the appeal bond sustained the execution of the judgment appealed from, that no attempt was made to enforce it during the pendency of the appeal, and both parties took the appeal bond as sustaining all action upon the judgment in question. This is a sufficient consideration for the execution of a bond and the surety is not released because of the alleged defect as stated."

In *Summit v. Coletta*, 78 A. 1047, it was held that an appeal bond not given for an illegal purpose, complying substantially with the statute, and voluntarily entered into, will be held binding although proceedings prior to its execution may have been irregular.

In *Fulton v. Fletcher*, 12 App. (D. C.) 1, it was held that in a suit upon an appeal bond, a collateral attack upon the jurisdiction of the appellate court upon the ground that the appeal was from an interlocutory order and not a final decree, cannot be sustained where that court has discretionary power to entertain appeals from interlocutory orders, and it assumed the jurisdiction in the order appealed from.

In the case of *Barrett v. Grimes*, 63 Pac. 272, the defendants appealed from an order of the probate court appointing plaintiff administrator of a decedent's estate. The case was heard on the appeal in the District Court and the judgment sustained. It was held that although no appeal was allowable from such an order, there was sufficient consideration for the appeal bond and the defendants were estopped from denying its validity.

In *McVay v. Peddie*, 96 N. W. 166, the court stated:

"In this case the appellant obtained by his proceedings, all that he had stipulated for in the instrument in suit. He had a trial upon the merits in the District Court where the judgment was rendered, to which all parties acquiesced, and during the pendency of the proceedings, he remained in possession of and enjoyed the fruits of the demanded premises. The absence of jurisdiction in the District Court did not affect him injuriously, and whether the judgment which was there recovered, was void or voidable, it was rendered at his instance and he cannot be justly permitted to attack it collaterally in an action upon an undertaking by which he deliberately promised to respond in damages if it should be adverse to his desires."

On page sixty-one of appellant's brief, it is stated that each and every point raised in the appeal was presented specially in the written motion for new trial (Tr. 13), which was denied after hearing (Tr. 16). It is within the discretion of the trial court to deny a motion for new trial, and such a ruling is not reviewable on appeal. *Southern Surety Company v. United States*, 23 Fed. (2d) 55.

It is therefore submitted that the trial court properly sustained the demurrer in this case and that the judgment should be affirmed. It is contended that the Government's case, even if it should be found that the trial court improperly sustained the demurrer, should not

be dismissed on account of the fact that when the demurrer was sustained, the facts pleaded in the answer were out of the case and not considered.

It is also submitted that the case should not be dismissed by the upper court on account of the fact that sufficient proof was adduced to warrant recovery and also because the appellant herein did not properly question the insufficiency of the evidence to sustain the judgment during the trial below.

Respectfully submitted,

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5496

NATIONAL SURETY COMPANY, a corporation,
Appellant.

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Appellant's Reply Brief

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Appellant's Reply Brief

I.

The Government's brief practically admits that the demurrer to the entire answer was improperly sustained.

The first point made in appellant's opening brief (pp. 12-19) is that "a demurrer to the answer cannot be sustained where the answer denies material and essential allegations of the writ."

Nowhere in its brief has the Government attempted to meet this proposition. It is fundamental that it is erroneous to sustain a general demurrer to a pleading which is good in any part (see cases cited, p. 24 opening brief).

As pointed out in the opening brief (pp. 15-19) the answer denies many material allegations of the writ. It denied the condition of the bond as alleged; denied that the defendant was ever called at any time whatsoever; denied that Unverzagt made default; and denied that he had ever been ordered to do anything which he had not done; denied that he had failed to obey any order which he was bound by the bond to obey; denied that he had not failed to abide by any order of the court previously entered.

There can be no question but that these matters were essential facts to allege and prove. Consequently the demurrer was improperly sustained and the judgment must be reversed.

II.

In its brief the Government argues (pp. 1-2) that since it actually proved the judgment *nisi* that proof

of this fact was proof that the defendant was called and failed to appear. From this proposition it is contended (p. 3) that the defendant's denials of material allegations in the writ were unavailing because the Government proved the facts denied.

This is clearly illogical. When the demurrer was sustained to the entire answer the defendant was refused the right to meet any evidence introduced by plaintiff. The defendant having denied the material allegations, it might have, and actually intended to, disprove them regardless of the plaintiff's evidence.

The Government, in its brief, has fallen into the same error that the court did in sustaining the demurrer, when the following occurred at the trial (Tr. 24): "The court stated that in making the ruling on the demurrer, the court takes judicial notice of the fact—as to the first affirmative defense, that the defendant was not called upon the 13th day of May, 1925—that the record does show that he was called at that time, so there is nothing in that defense."

We thus have the court sustaining a demurrer to an answer because he has determined beforehand that he does not believe that the defendant can sustain the denial made. Very clearly the court cannot, in considering a demurrer to an answer, question the ability of the defendant to sustain its denial.

Moreover, the argument made by the Government that proof of the judgment *nisi* is proof that the defendant was called but did not appear, is fallacious.

The Government has argued in its brief that the defendant surety is not entitled to notice of the forfeiture, nor is it entitled to notice to produce the defendant before the forfeiture is made. It is contended by the Government that a forfeiture can be made *ex parte* by the Government. If such is the case the surety is certainly not bound by the *ex parte* minute entry of an order of forfeiture. If the surety were so bound, then all the Government would have to do to prove any case would be to make an *ex parte* motion for the forfeiture of a bail bond, whether the defendant actually appeared or not, and the surety would never be permitted to contest that minute entry of forfeiture. It might be that the defendant was not called; or that the defendant was called and appeared and plead guilty; it might be that the entry of a forfeiture was a mistake. But under the Government's contention the surety would be bound by the entry so made.

Such a contention is too unreasonable and absurd to merit consideration.

Moreover, the particular judgment *nisi* here offered amounted to nothing more than a mere state-

ment by the clerk, who had not been sworn to testify, that the docket showed that a forfeiture was made on May 13th. The short bill of exceptions will be searched in vain to find any evidence of a judgment *nisi* of any nature; certainly no judgment *nisi* which shows calling of the defendant or a failure to appear.

The foundation of the rule that the judgment *nisi* imports verity is in the proposition that judgments are not open to collateral attack. Such a rule, however, is based upon the theory that a judgment has been produced which, on its face, shows all of the jurisdictional facts upon which it is based, and was made at a time when the defendant had a right to appear and be heard. The rule was never intended to apply to a minute entry, made *ex parte,* and without notice. It certainly was never intended to apply to a situation where the clerk merely states what his docket shows, without putting the docket in evidence, or his minutes in evidence, and without the clerk even being sworn.

III.

At page 3 the Government attempts to meet the proposition presented in pages 19 and 20 of the opening brief that the first affirmative defense of the answer constitutes a good defense.

The first affirmative defense alleged that the defendant was re-arrested after giving the first bond,

and "that said second arrest was on the same charge on which said Unverzagt was originally arrested."

The Government admits (page 5) that the rule of law is that a re-arrest on the same charges releases the bail, but attempts to contend that it was not pleaded that the re-arest was upon the same charge.

The answer (Tr. 6) however, plainly states: "That said second arrest was on the same charge on which said Charles H. Unverzagt was originally arrested."

No amount of argument can avoid this plain statement in the answer. Moreover, in considering the demurrer to an answer, where the demurrer is made at the time of the trial, the rule is well settled that every possible intendment and inference will be given to the pleading against which the demurrer is directed.

IV.

At page 6 it is contended that the second affirmative defense does not state a good defense; and that the second defense is a mere conclusion. However, an examination of that defense will show that it contains an allegation "that the bond intended to be forfeited is the property bond signed by Charles H. Unverzagt as principal, and M. H. Casey and Agnes J. Pendleton as sureties." In view of the history of this case, as set forth in the opening brief, the question of intention as to which bond was to be forfeited,

was and is a question of fact. There were two bonds in the same matter. If it was the other bond which was intended to be forfeited, not this surety's bond, the only way that defense could be presented was by pleading it as a fact. Consequently, a good defense was presented.

V.

At page 7 it is contended that the third and fourth affirmative defenses are demurrable because they constitute "matters which are merely denials." An examination of those defenses, however, will show that they were matters upon which defendant might offer proof to avoid the forfeiture.

In any event, if they were "merely denials," they put in issue the allegations of the complaint and made it improper to sustain a demurrer to the answer.

VI.

At page 7 it is further contended that no reply to the affirmative defenses was necessary because a demurrer was made to said defenses during the trial. However, an examination of the record will show that this case was at issue long prior to the date of the trial, and that no demurrer had been filed or made until the date of the trial.

It is again contended at this point that the answer is insufficient, although the Government admits (p. 7)

"that the denials in said answer, both in the general denials and in the affirmative defenses," existed.

VII.

At page 8-12 the Government contends that there was no necessity for a reply in this case. It bases its contention on the fact that a demurrer was interposed to the pleading. The record, however, shows that the issues in this case were made up long prior to the trial; and that the demurrer was only interposed orally at the time of the trial. The transcript and bill of exceptions (p. 23) show that the Government offered evidence in the case before the demurrer was ever disposed of.

It is not the rule, and never has been the rule, that a party can relieve himself from the necessity of filing a reply to affirmative matter by the simple and expedient trick of waiting until the trial to make a demurrer to the answer and affirmative defenses.

It is further contended at this point by the Government that its demurrer did not admit the facts other than for the sake of the argument on the demurrer. However, no reply was filed, and furthermore the Government took the position at the trial that the answer in no way constituted a defense. (See bill of exceptions, Tr. 23.) The Government's action in waiting to demur until the time of the trial, and

taking the position that the answer constituted no defense, amounted to a motion for judgment on the pleadings. In the opening brief cases have been cited to the effect that failure to reply makes the affirmative allegations of the answer equivalent to findings of fact by the court.

VIII.

At pages 12 and 13 the Government contends that the court did not decide the case on both the demurrer and the merits. It says, page 13: "This is not possible. The court either decided the case on the ground that the demurrer to the answer was well taken, or on the ground that insufficient evidence was produced to prove the case. The decision could not possibly have been made on both grounds legally."

However, that is exactly what the court did. The bill of exceptions (Tr. 24) shows that counsel for the defendant distinctly asked the court whether the case had been disposed of on the demurrer or the evidence, and the court replied that the ruling had been made on both the demurrer and the evidence. Certainly the transcript shows that the demurrer was sustained. Likewise, it shows that the decision was given on the merits. Likewise, the judgment entered expressly recites (Tr. 12) that the case was decided on the merits.

The motion for a new trial (Tr. 13) raised this very point, that the decision of the court in sustaining the demurrer and in rendering judgment on the merits was erroneous.

The Government states (p. 13) "when the trial judge sustained the demurrer in this case, it precluded him from deciding the case on the merits so far as the issues were concerned." If this be so, then the judgment of the trial court was clearly erroneous.

IX.

At pages 13-17 the Government contends that if it is claimed that the case is decided on the merits, the appellant cannot now question whether or not there was any evidence whatsoever to support the judgment, by reason of the fact that no exception was taken to any finding of the court, and that no motion for dismissal on account of the insufficiency of the evidence was made.

In support of this position several cases are cited to the effect that the trial court's attention must be brought squarely to the error claimed; that in the absence of a motion for a dismissal none will be permitted. In particular the Government quotes from *Grainger Bros. v. Amsinck,* 15 Fed. 2nd 329, wherein it is said that when the district court tries an action without a jury and makes a general or special finding

of fact, the appellate court cannot review the judgment, "for any error of fact, and that a finding of fact contrary to the weight of the evidence is an error of fact."

The following part of the quotation, however, shows clearly that this case is not applicable, because there the court said, as is quoted by the Government, page 14:

> "The question of law, whether or not there was any substantial evidence to sustain any such finding, is reviewable, as in a trial by jury, only when a request or motion is made, denied and excepted to, or some other like action is taken which fairly presents that question to the trial court and secures its ruling thereon."

In the case at bar the question is whether or not there was any evidence to sustain the judgment of the lower court. It is vigorously contended that there was no evidence. We do not have a case of "the weight of the testimony," because the defendant offered no testimony. There was, however, a total absence of proof by the Government.

The appellant not only made a motion for new trial, which called the court's attention *sharply* to all the errors claimed, but also made a written request that the writ be dismissed (Tr. 16) "that by reason of said facts the defendant made no default and said bond was a nullity, and that the writ of *scire*

facias should be dismissed." Refusal to grant this request was excepted to (Tr. 17).

Moreover, the Government, in this court, is still claiming that the case should be decided on its merits (Government's brief p. 31). There is no contention that the question of the demurrer was not properly presented to the trial court for review in this court. The Government, however, does not stop with a consideration of the demurrer, but goes on to attempt to sustain the judgment on its merits; and, at page 31, requests that this Court affirm the case upon the merits. The Government has, therefore, submitted the case to this Court on its merits, and therefore the citations given in the Government's brief, that the case is not properly before this court, are not in point. At the request of both parties for this Court to decide the matter on the merits, the decision is properly reviewable.

X.

At pages 17 and 18 the Government attempts to meet the proposition advanced at page 37 of the opening brief, that there was no proof whatsoever of any judgment or order of the district court discharging the writ of habeas corpus, and ordering Unverzagt's removal to the Federal Court.

The transcript and bill of exceptions will be searched in vain for any such evidence.

Counsel for the Government does not point out any such evidence in the bill of exceptions, but relies upon matter found in the written order denying the motion for new trial. At page 17 the Government quotes from this order, and at page 18 it contends that the trial court was justified in holding that such a fact existed, and had been proved in this case because "he was cognizant of and aware of the fact that he had discharged the writ of habeas corpus and ordered the defendant Unverzagt removed."

The court's independent knowledge of some fact or alleged fact gained through some other proceeding will not take the place of evidence introduced in this case.

Moreover, the Government admits (p. 18) that "apparently no final order was entered." It was the defendant's contention in the lower court, made at the hearing and raised in the motion for new trial, that since no final order was ever entered directing Unverzagt's removal, he could not make a default in failing to abide by such order.

XI.

At page 18 the Government attempted to meet the proposition advanced by appellant at pages 38-43 of its opening brief, wherein it was shown that there was no proof whatsoever that the defendant Unverzagt was called and failed to appear.

The Government contends (p. 18) that the forfeiture *nisi* was proved because "an examination of the bill of exceptions in this case (Tr. 23) will show that the clerk testified that the defendant Unverzagt was called in May, 1925, that the forfeiture was made on May 13, 1925, according to the docket."

However, an examination of the bill of exceptions (Tr. 23) shows that the clerk was not sworn and did not testify as to any forfeiture. The clerk was asked what the record showed, and responded to that question. But he was not sworn and no testimony was introduced.

Moreover, the clerk's mere statement that the docket shows that the defendant was called in May, 1925, and forfeiture was made on May 13, 1925, would not constitute any proof that the defendant failed to appear. The cases cited by the Government (pp. 19-20) are cases in which a real judgment *nisi* was entered and proved.

At page 20 the Government contends that "in view of the fact that the bill of exceptions shows judgment *nisi* and shows that the defendant was called, that the trial court did not err in granting judgment for the Government herein." But, as shown, the bill of exceptions does not show the judgment *nisi*.

XII.

At pages 20 and 21 the Government cites a Washington statute which provides that the omission to note the default of the defendant "at the time when such default shall happen" will not bar a proceeding on the bond. This statute, however, does not provide, nor could it provide, that the Government is relieved from proving a default in some manner. It is not the failure to *note* the default that we are complaining of; but it is the failure to *prove* the default in some manner, which we contend was fatal to the Government's case.

XIII.

At page 23 the Government attempts to meet the point made at page 46 of appellant's brief, where it is shown that the bond sued upon in the writ was not the bond proved.

At page 46 of the opening brief it was pointed out that the bond proved in no way conformed to the bond alleged. The theory of the writ was that the bond given was one to answer the orders of the *district* court, while the bond proved was one to answer the orders of the *United States Circuit Court of Appeals.* The bond was prescribed and conditioned as required by Rule 33 of the Circuit Court.

The Government contends, pages 23-24, that this objection was waived by failure to object to the bond. There is, however, no merit in this contention, as we have here a question of not merely a variance, but of a total failure of proof. The rule regarding the waiver of variances applies to matters of form, but not matters of substance. In other words, the Government cannot sue upon a bond conditioned for the appearance of the defendant to answer a criminal charge, and then put in evidence a bond for the construction of a battleship, and have judgment rendered on the writ describing a bail bond simply because the defendant did not object to the battleship construction bond when it was placed in evidence. The Government had to prove the bond as alleged in the writ. If the bond proved varied only in immaterial details, as to dates or slight misdescription of names, the variance would be waived by failure to object. But where the bond offered in no way corresponds to the bond alleged, and where the bond offered is based upon an entirely different theory and for an entirely different purpose than the bond alleged, we have a case of total failure of proof, rather than a question of variance.

Moreover, the defendant denied that the condition of the bond was as pleaded in the writ. The court sustained the demurrer to the answer, and conse-

quently prohibited the defendant from questioning the bond offered. This very point demonstrates the fact that the demurrer should not have been sustained. It further goes to show that the Government failed in its proof, and that the court was in error in granting judgment for the Government, and was in error in failing to grant judgment for the defendant.

XIV.

The Government at no place attempts to answer the point made at page 48 of the opening brief, that "The defaults claimed in the writ are not defaults under the conditions of the bond proved." It was pointed out at pages 48-53 of the opening brief that the bond alleged was one to answer the orders of the district court; whereas the bond given was one to answer and abide by the orders made by the Ninth Circuit Court, and was given expressly in accordance with Rule 33 of the Circuit Court. It was further pointed out that the Government alleged in its writ that the default made under the bond was the failure to obey the orders of the *district* court; and that this could not be a default under the conditions of the bond proved, because the bond proved was not conditioned for appearance to answer the judgment of the District Court, but conditioned to answer the judgment of the appellate court.

At page 24 of its brief the Government contends "that the covenant in the bond in the case at bar, which provides that the defendant Unverzagt obey the orders of the Circuit Court of Appeals, and surrender himself in execution of the judgment and decree appealed from if the Circuit Court shall affirm the order appealed from, required by implication the appearance of the defendant Unverzagt before the lower court when the mandate from the upper court was sent down affirming the case."

The Government, however, fails to note that the bond requires that the defendant (Tr. 27) "shall surrender himself in execution of the judgment and decree *appealed from* as said court may direct if the order and judgment against him shall be affirmed." The Government has at no place alleged or proved that the Circuit Court made any order directing Unverzagt to surrender himself.

We respectfully submit that the Government utterly failed to meet the contentions made in the opening brief (pp. 48-53).

XV.

At page 26 the Government attempts to meet the point made by appellant at page 54 of the opening brief that "the bond sued upon is utterly void because no final order was ever made."

The theory of the writ was that an order had been entered dismissing the writ of habeas corpus, and ordering Unverzagt's removal to New York. The answer denied that any such order was ever entered, and the record showed that no final order of removal was ever entered, and in fact a minute entry expressly provided that the final order should be later entered.

The Government at page 26 contends that it will be seen from the order denying the motion for new trial (Tr. 17) that the parties considered the minute order of the court discharging the writ and ordering the removal, as a final order. However, this written order denying the motion for new trial was not a part of the evidence upon which the case was decided. The Government further contends that a final order was not necessary, but does not meet the point made at page 56 of the opening brief that the Circuit Court of Appeals has a limited jurisdiction, to review "final decisions of district courts." It is elementary that the parties cannot confer jurisdiction upon a court which does not have jurisdiction, and that the question of jurisdiction can always be raised. An order made by a court without jurisdiction to enter the order is a nullity.

The Government does not attempt to meet the point raised at page 56 that the rule of the Circuit Court

(Rule 33) permits an appeal in habeas corpus only from a "final decision" and that a bail bond cannot be given except in an appeal from a "final decision" under said rule.

At page 26 the Government claims that appellant's contention that no appeal was allowable "is without merit because the Circuit Court for the Ninth Circuit assumed jurisdiction." As pointed out, a court which is a court of limited jurisdiction, fixed by statute, cannot assume jurisdiction, and any act outside the jurisdiction of the court is void.

XVI.

At pages 27-30 the Government attempts to meet the point raised at page 58 of the opening brief that "where no appeal was allowable no action can be maintained on the appeal bond."

The Government admits, page 27, the rule contended for by appellant, "that where no appeal was allowable no action can be maintained on the appeal bond." The Government says: "The Government concedes it to be the rule, where the appeal was dismissed prior to the Circuit Court taking jurisdiction of the case." The Government then contends that such rule is not applicable because the Circuit Court did take jurisdiction. However, as pointed out, the Circuit Court cannot take jurisdiction where there is

no authority in law for it to exercise jurisdiction. The Circuit Court's jurisdiction is limited to the review of *final* orders. Where there was no final order the Circuit Court was without jurisdiction.

XVII.

At page 30 the Government contends that the motion for new trial was properly denied, and further contends that it was within the discretion of the trial court to deny the motion for new trial, and that such a ruling is not reviewable on appeal.

There can be no question but that this is ordinarily the rule. But it is vigorously contended that where the motion for new trial presents grounds which are such as to require a new trial under any circumstances, the lower court's refusal to grant the motion for new trial is an absolute *abuse of discretion.* In the case at bar the written motion for new trial (Tr. 13) which was denied after a lengthy hearing, (Tr. 16) and a written order denying the motion for new trial entered (Tr. 16) presents specifically and in detail, the point that it raised in this brief. In particular it claimed error in the court's sustaining the Government's oral demurrer to the amended answer, in entering judgment for the plaintiff, and in refusing to enter judgment for the defendant; it raised the question of the insufficiency of the evidence to justify

the decision (a) because there was no final order entered; (b) no order which the defendant had not complied with; (c) no evidence to show that the defendant had been called to answer; (d) no evidence that defendant made default; (e) no evidence that the defendant at any time failed to obey any order of the court which he was bound to obey, and which was covered by the bond; (f) that it affirmatively appears that the bond in the case was superseded by a subsequent property bond; (g) that it appeared that the bond was given to be effective only if the trial court was reversed by the Circuti Court; and it further appeared that the judgment was not reversed, but was affirmed.

WE CALL THE COURT'S ATTENTION TO THE FACT THAT IN CONNECTION WITH THE MOTION FOR NEW TRIAL A DIRECT REQUEST WAS MADE TO DISMISS THE ACTION (see affidavit annexed to motion for new trial. Tr. 15-16). In the affidavit the request was made that the writ be dismissed: "That by reason of said facts defendant made no default, and said bond was a nullity, and the writ of *scire facias* should be dismissed." The court refused to grant the motion for new trial and dismiss the writ, and an exception was taken to this order (Tr. 17).

XVIII.

The Government concludes its brief, page 31, with a request that this Court should not only consider the demurrer, but should consider the fact that there was sufficient proof adduced to warrant recovery. The Government has, therefore, submitted this case to this Court on the merits. Having submitted the case on the merits, and asked that the case be affirmed on the merits, this Court should consider whether or not there was any proof of the essential allegations of the writ. As we have shown in the opening brief, there was an utter failure of proof that the defendant was called; that the defendant failed to appear; that any order was ever made by the Circuit Court which the defendant failed to obey; that there was no proof of the judgment *nisi;* that there was no proof of authority under which the bail bond was given; that the bond proved was not the bond sued upon; that the defaults claimed in the writ are not defaults under the conditions of the bond proved; that the bond sued upon was void because no final order was ever made.

We sincerely submit that the Government cannot take the position in this Court that the demurrer was properly sustained, but that if it was not properly sustained, then the case was proved on the merits; and at the same time avoid submitting this case to the Court on the merits.

The trial court permitted the demurrer to be sustained and decided the case on the merits, without any evidence from defendant. The Government requests the same thing in this Court. We submit that this Court should find that the demurrer was improperly sustained, and that the Government's evidence was insufficient to support a judgment on the merits, and should dismiss the case upon its merits.

This is a proper procedure because the evidence here shows conclusively that the Government could never make a case because the bond sued upon is utterly void, because no final order was ever made which would support the bond; and further because the bond, when produced, is utterly inconsistent with the allegations of the writ of *scire facias.*

Respectfully submitted,

CALDWELL & LYCETTE,

Attorneys for Appellant.

No. 5497

United States

Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL SURETY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court, Western District of Washington, Northern Division.

No. 9548.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LARRY H. BURNS,
Defendant.

WRIT OF SCIRE FACIAS.

President of the United States of America, to the Marshal of the Western District of Washington:

WHEREAS, heretofore, to wit, on the 5th day of

*Page-number appearing at the foot of page of original certified Transcript of Record.

February, 1925, a recognizance and surety bond in the sum of Seven Hundred Fifty Dollars ($750.00) was executed by the defendant Larry H. Burns, as principal, and the National Surety Company, as surety, which said recognizance and surety bond was conditioned for the appearance of the said defendant Larry H. Burns before the United States District Court for the Western District of Washington, Northern Division, at the courthouse in the city of Seattle, during the May, 1925, term of said District Court, and from time to time, and term to term, thereafter, to answer a charge of the United States of America exhibited against the said defendant, and not to depart out of the jurisdiction of the Court without leave; and that thereafter, on the 10th day of February, 1925, the said recognizance for appearance before the said District Court, and property bond was filed in said court with the Clerk thereof.

AND, WHEREAS, thereafter, to wit, on the 8th day of September, 1925, and at a proper term of said court, the said defendant Larry H. Burns, being called to come into court [2] and answer said charge, came not, but made default, whereupon, on motion of United States District Attorney, it was considered by the Court that for the default aforesaid, the said defendant Larry H. Burns, as principal, and the National Surety Company, as surety, forfeit and pay to the United States of America the sum of Seven Hundred Fifty Dollars ($750.00) according to the tenor and effect of said recognizance and surety bond now in the hands of the

Clerk of said court, unless they appear at the next term of said court, and show sufficient cause to the contrary.

YOU ARE, THEREFORE, HEREBY COMMANDED, to make known the contents of this writ to the said defendant Larry H. Burns and said National Surety Company, and summon them to appear before said District Court of the United States, at a court to be held before the Western District of Washington, Northern Division, at the courthouse in Seattle, on the 15 day of November, 1926, and to show cause, if any they have, why judgment *nisi* aforesaid should not be made absolute; and further, to show cause why they ought not to have execution issue against them for the respective amounts due to the United States of America, upon said surety bond, under the judgment aforesaid, together with any costs which may accrue by reason of proceedings to be had in the enforcement of said judgment, as by law provided.

HEREIN FAIL NOT.

WITNESS, the Hon. EDWARD E. CUSHMAN, Judge of the United States District Court, at Seattle, in said District on the 18 day of October, 1926.

[Seal] ED. M. LAKIN,

Clerk of the District Court of the United States for the Western District of Washington.

By T. W. Egger,

Deputy Clerk, U. S. District Court, Western District of Washington. [3]

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed scire facias on the therein named National Surety Co., by handing to and leaving a true and correct copy thereof with G. L. Stevick, Atty. and Supt., personally, at Seattle, in said District, on the 18th day of Oct., A. D. 1926.

E. B. BENN,
U. S. Marshal.
By J. E. Williams,
Deputy.

Western District of Washington,—ss.

I hereby certify and return, that on the 18th day of Oct., 1926, I received the within scire facias and that after diligent search I am unable to find the within named defendants Larry H. Burns within my district.

E. B. BENN,
United States Marshal.
By J. E. Williams,
Deputy United States Marshal.

[Endorsed]: Filed Oct. 21, 1926. [4]

[Title of Court and Cause.]

RETURN TO WRIT OF SCIRE FACIAS.

Comes now the National Surety Company, surety on the bond of Larry H. Burns, defendant herein,

and making answer and return to the writ of scire facias heretofore issued herein, admits, denies and alleges as follows, to wit:

I.

Said surety denies that the said recognizance and surety bond was conditioned for the appearance of said defendant before said District Court during the May, 1925, term of said court and from time to time and term to term thereafter.

II.

Said surety denies that on the 8th day of September, 1925, and at a proper *time* of said court, said Larry H. Burns was called to come into court and answer said charge, and denies that said Larry H. Burns was called at any proper time; and denies that said surety or said Larry H. Burns made any default under said bond.

For further return and answer to said writ of scire facias, and as a first affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That no charge was filed against said defendant, Larry H. Burns until May 15, 1925, which was three months after [5] the date on which said defendant was bound by said bond to appear, and was in the next term of court after the term in which said defendant was by his bond bound to appear.

For further return and answer to said writ of scire facias, and as a second affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That the charge for which said defendant was bound by his said bond to appear was the charge of having "on or about November 21, having violated the National Prohibition Act," while the charge which was filed against said defendant was the charge of having "on October 4, October 16, October 24, October 31 and November 8, violated the National Prohibition Act," none of which alleged violations were on or about November 21, as provided for in said bond.

For further return and answer to said writ of scire facias, and as a third affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That on May 26, 1925, said defendant appeared in said court and plead guilty to two of the counts filed against him, and thereby fulfilled the condition of his said bond.

For further return and answer to said writ of scire facias, and as a fourth affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That the appearance required by the condition of said bond was an appearance in the November, 1924, term, and not the May, 1925, term of said Court.

WHEREFORE, having made its return to the writ of scire facias issued herein, and having fully answered the same and having shown cause why the judgment *nisi* aforesaid should [6] not be

made absolute and why execution should not issue against the National Surety Company for the amount claimed in said writ of scire facias, the National Surety Company prays that judgment absolute be not rendered against it, and that it be relieved from any and all liability under said bond, and from any and all costs accruing thereunder and that said writ of scire facias be discharged.

HUGH M. CALDWELL,
JOHN P. LYCETTE,
Attorneys for the National Surety Company.

United States of America,
Western District of Washington,
Northern Division,—ss.

John P. Lycette, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the National Surety Company, a corporation, and makes this verification for and on behalf of said National Surety Company for the reason that it is a foreign corporation and that there is no officer thereof within the State of Washington upon whom service of process may be had; that he has read the foregoing return to writ of scire facias, knows the contents thereof and believes the same to be true.

JOHN P. LYCETTE.

Subscribed and sworn to before me this 15th day of November, 1926.

[Seal] W. H. SUTTON,
Notary Public in and for the State of Washington,
Residing in Seattle.

[Endorsed]: Filed Nov. 15, 1926. [7]

[Title of Court and Cause.]

WAIVER OF JURY.

Comes now the National Surety Company, and waives any right it might have to a jury trial herein.

NATIONAL SURETY COMPANY.
By CALDWELL & LYCETTE,
Its Attys.

O. K.—PAUL D. COLES,
Asst. District Attorney.

[Endorsed]: Filed Jun. 13, 1927. [8]

United States District Court, Western District of Washington, Northern Division.

No. 9548.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LARRY H. BURNS,
Defendant.

JUDGMENT.

It appearing to the Court from the records and files herein and from the evidence adduced that on the 8th day of September, 1925, the above-named defendant Larry H. Burns was duly called into this court to answer to the information heretofore filed against him charging him with violation of Sections 3 and 21, National Prohibition Act, and that when

so called the said defendant Larry H. Burns, defaulted and failed to appear, and that he was duly and regularly summoned from the door of said courtroom three times to appear and answer to said information, and again failed to appear; and that thereafter on, to wit, the 8th day of September, 1925, the recognizance and surety bond which was executed by the said defendant, Larry H. Burns, in the sum of $750.00, which said recognizance and surety bond was conditioned for the appearance of the said defendant Larry H. Burns, before the United States District Court for the Western District of Washington, Northern Division, at the courthouse in the City of Seattle, at the next term, to wit, Nov., 1925, term, of said District Court, and from time to time and from term to term thereafter, was upon motion of the United States Attorney duly forfeited and judgment *nisi* thereupon entered defaulting said recognizance and sureties upon said surety bond.

That thereafter on the 18th day of October, 1926, a writ of scire facias was duly issued out of this court commanding the said Larry H. Burns as principal, and National Surety Company as surety, [9] to appear before this Court on the 15th day of November, 1926, to show cause why said judgment *nisi* should not be made absolute, and further, to show cause why they ought not to have execution issue against them, and each of them, for the amount due to the United States of America upon said surety bond under the judgment as aforesaid, together with any costs which may accrue by reason of proceedings to be had in the enforcement of

said judgment as by law provided, and that the said defendant Larry H. Burns could not be found, and that service was effected on said National Surety Company, as surety, and that the said writ has been duly returned into this court by the United States Marshal for said district with his return thereon as aforesaid; and an answer to said writ was regularly filed by the surety company, and on May 10, 1927, the matter was regularly brought on for hearing before the undersigned, one of the Judges of the above-entitled court for the Western District of Washington, the United States appearing by Thomas P. Revelle, United States Attorney, and Paul D. Coles, Assistant United States Attorney, and the National Surety Company appearing by Hugh Caldwell, its attorney; and the Court being fully advised in the premises, it is by the Court

ORDERED AND ADJUDGED that the said judgment *nisi* entered herein on the 8th day of September, 1925, forfeiting said recognizance and declaring that said defendant Larry H. Burns as principal, and National Surety Company as surety, forfeit and pay to the United States of America the sum of Seven Hundred Fifty ($750.00) Dollars, according to the tenor and effect of said recognizance and surety bond, be made absolute; and it is further

ORDERED that the Clerk of the above court be, and he hereby is authorized and directed to issue writ of execution against the property of said National Surety Company, surety upon said surety

bond, for the sum of Seven Hundred ($750.00) Dollars, together with all costs which may accrue by reason of proceedings to be had in the enforcement of said judgment, as by law provided.

Done in open court this 9th day of March, 1928, to all of which the deft. surety excepts.

JEREMIAH NETERER,
United States District Judge. [10]

[Endorsed]: Filed Mar. 9, 1928. [11]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the UNITED STATES OF AMERICA, Plaintiff, and to THOS. P. REVELLE, United States Attorney, and PAUL D. COLES and DAVID L. SPAULDING, Assistant United States Attorneys, Its Attorneys:

You, and each of you, will please take notice that the defendant, National Surety Company, in the above-entitled cause, has appealed, and does hereby appeal, to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain judgment entered in the above-entitled court and cause on the 9th day of March, 1928, and from the whole and every part thereof.

Dated this 21st day of April, 1928.

CALDWELL & LYCETTE,
Attorneys for National Surety Company.

[Endorsed]: Filed Apr. 23, 1928.

Copy received this 23 day of April, 1928.

PAUL D. COLES,
Asst. United States Attorney. [12]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Now comes the defendant, National Surety Company, and files the following assignments of error upon which it will rely on its prosecution of the appeal in the above-entitled cause, from the decree made by this Honorable Court on the 13th day of June, 1927.

1. That the United States District Court for the Western District of Washington, Northern Division, erred in refusing to grant the appellant and defendant's motion for a nonsuit.

2. That said Court erred in granting judgment for the plaintiff and respondent.

3. That said Court erred in refusing to grant judgment for the defendant and appellant, dismissing the cause.

WHEREFORE, appellant prays that said judgment be reversed, and that the United States District Court for the Western District of Washington, Northern Division, be ordered to enter a judgment and order reversing said decision in said cause.

CALDWELL & LYCETTE,
Attorneys for Defendant, National Surety Company.

[Endorsed]: Filed Apr. 23, 1928. [13]

[Title of Court and Cause.]

SUPERSEDEAS AND COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, the National Surety Company, a corporation, appellant herein, as principal, and the New York Indemnity Company, a corporation organized under the laws of the State of New York, authorized to transact the business of surety in the State of Washington, and in the District of Washington, as surety, are held and firmly bound unto the United States of America, plaintiff herein, in the full and just sum of Fifteen Hundred ($1500.00) Dollars, well and truly to be paid, we bind ourselves and our, and each of our, heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 21st day of April, 1928.

The condition of this obligation is such, that,

WHEREAS the above-named plaintiff, United States of America, on the 9th day of March, 1927, in the above-entitled court and action, recovered judgment against the defendant above named in the sum of Seven Hundred Fifty ($750.00) Dollars; and

WHEREAS, the above-named principal, National Surety Company, a corporation, has heretofore given due and proper notice that it appeals from said decision and judgment of said District

Court, to the United States Circuit Court of Appeals for the Ninth [14] Circuit;

Now, Therefore, if the said principal, the National Surety Company, a corporation, shall pay to said plaintiff and respondent, the United States of America, all costs and damages that may be awarded against said National Surety Company, a corporation, on said appeal, and shall prosecute its said appeal to effect, and answer all costs if it fail to make good its plea, and shall satisfy and perform the judgment and order appealed from, in case it shall be affirmed, and shall satisfy and perform any judgment or order which the said United States Circuit Court of Appeals for the Ninth Circuit may render or make, or order to be rendered or made by said United States District Court for the Western District of Washington, Northern Division, then this obligation to be void; otherwise to remain in full force and effect.

NATIONAL SURETY COMPANY.

[Seal] By JOHN P. LYCETTE,

Its Atty.

NEW YORK INDEMNITY COMPANY.

[Seal] By J. GRANT.

The above supersedeas and cost bond on appeal is hereby approved as to form and amount.

JEREMIAH NETERER,

United States District Judge.

O. K.—Form and substance.

PAUL D. COLES,

Asst. U. S. Atty.

[Endorsed]: Filed Apr. 23, 1928. [15]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING JUNE 11, 1927, TO FILE BILL OF EXCEPTIONS.

This matter having come on regularly for hearing on the motion of the National Surety Company for an order extending the time for filing a bill of exceptions in the above-entitled matter, until Saturday, June 11th; and it appearing that there is no objection thereto,—

NOW, THEREFORE, IT IS HEREBY ORDERED that the time for filing a proposed bill of exceptions in this cause be, and the same is hereby extended to and including Saturday, June 11th, 1927.

Done in open court this 8th day of June, 1927.

JEREMIAH NETERER.

PAUL D. COLES,
Asst. U. S. Attorney.

[Endorsed]: Filed Jun. 8, 1927. [16]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that heretofore, to wit, on the 13th day of June, 1927, this cause came on regularly for trial before the Honorable Jeremiah Neterer, one of the Judges of the above court, sitting without a jury, a written waiver of trial by

jury having been filed as required by law; the plaintiff appearing by Thos. P. Revelle and Paul D. Coles, its attorneys, and the National Surety Company appearing by Hugh M. Caldwell and John P. Lycette, its attorneys, and the defendant Larry H. Burns not appearing;

Thereupon the following proceedings were had and testimony taken, to wit:

The Government stated that it was ready to go to trial and made a motion to amend the writ changing the words "November term" to "May term"; motion was allowed.

The Government offered in evidence Exhibit 1, which was the bond, which was in the Commissioner's transcript. It was stipulated that the bond was filed on the date it bears, was in the sum of $750.00, and that the same had not been paid. It was denied that the defendant was requested to appear in court on the 8th day of September, 1925. [17] Thereupon the Government offered in evidence lines from page 405, showing that on May 26th the defendant Burns revised his plea of guilty to counts one and two; all other counts were dismissed; that on May 26th an order was entered by the Court setting date of June 1st, 1925, for judgment and sentence. On June 1st, on Burns' assent, it was continued one week. On June 8th an order was entered putting over sentence to September 1, 1925; it does not appear at whose request. Judgment was put over until that time, and on September 1st the Court entered an order putting judgment and sentence over one week; on

September 8th, continuance of sentence was denied, and bail forfeited *nisi* and bench warrant issued for Burns. The records, from p. 405, lines six to fifteen, containing the evidence and entries above quoted, were offered without objection and admitted. Thereupon the bond was admitted. The Government rested.

Thereupon defendant made a motion for nonsuit on the ground that the Government's evidence does not justify making the judgment absolute, and its evidence shows affirmatively that the Government is not entitled to judgment absolute. The Court then stated that it had not been shown that the defendant had been called. The Government then offered page 493 of the journal entries of the District Court, under date of September 8th, 1925, case of United States vs. Larry H. Burns, cause No. 9548, order forfeiting bail, reading as follows: "Now on this 8th day of September, 1925, the above defendant is called for sentence and not responding is called three times in the corridor of the court. Not responding, bail is forfeited *nisi* and bench warrant issued." Thereupon the Government rested.

Defendant thereupon renewed its motion for nonsuit, which was denied. Defendant then offered additional evidence that the criminal docket shows the information was filed May 5, 1925. The criminal complaint in the action was offered in evidence and [18] was admitted by the Court.

Defendant thereupon rested; and the Government had no rebuttal.

Thereupon argument; defendant called the Court's attention to the fact that the information was not filed during the term for which the bond was given, nor was the defendant called in that term; that the charge was indefinite; that the defendant appeared and pleaded, and his sentence was continued so many times as to enlarge the obligation of the bond.

The Court took the matter under advisement on the ground that no charge was filed during the term in which the bond was given. Thereafter the Court entered judgment for the plaintiff, and the forfeiture was made absolute; to which an exception was taken and allowed.

This bill of exceptions contains in substance all the testimony offered in this case.

The National Surety Company prays that this, its bill of exceptions, may be allowed, settled and signed.

CALDWELL & LYCETTE,
Attorneys for National Surety Company.

Settled and allowed this 26 day of Sept., 1927.

JEREMIAH NETERER,
District Judge.

Copy of bill of exceptions received this 11 day of June, 1927.

THOS. P. REVELLE,
Attorney for Plaintiff.

[Endorsed]: Lodged Jun. 11, 1927. [19]

9548.

GOVERNMENT'S EXHIBIT 1—ADMITTED.

FINAL RECOGNIZANCE OF DEFENDANT.

United States of America,
——— District of ———,
Northern Division,—ss.

BE IT REMEMBERED, that on this 5th day of February, A. D. 1925, before me, as United States Commissioner for the said Western District of Washington, Northern Division, personally came Larry Burns, principal, and National Surety Co., sure*ties,* and jointly and severally acknowledged themselves to owe the United States of America the sum of Seven Hundred Fifty ($750.00) Dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

THE CONDITION of this recognizance is such, that if the said Larry Burns, principal, shall personally appear before the District Court of the United States in and for the Western District of Washington, on the —— day of the November term, to be begun and held at the City of Seattle, Wn., in said District, on the 9th day of February, 1925, and from time to time thereafter to which the case may be continued and then and there answer the charge of having, on or about the 21st day of November, A. D. 1924, within said District, in violation of Section —— of the N. P. A. (Act of ———) (Criminal Code) (Revised Statutes) of the United States, unlawfully, knowingly and wilfully maintain a common nuisance; and have,

possess and sell certain intoxicating liquor, and then and there abide the judgment of the said Court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

LARRY BURNS. [Seal]
NATIONAL SURETY COMPANY.
[Seal] By C. B. WHITE,
Attorney-in-fact.

Taken and acknowledged before me on the day and year first above written.

[Seal] A. C. BOWMAN,
United States Commissioner as Aforesaid. [20]

[Endorsed]: Part of Commissioner's Transcript. Court No. 2973. Filed Feb. 10, 1925. [21]

9548.

RESPONDENT'S EXHIBIT "A–1" ON RETURN TO WRIT OF SCIRE FACIAS—ADMITTED.

(Wash. 2397)
(Comm'r No. 2973—Bail $750 each.)

United States District Court, Western District of Washington, Northern Division.

May, 1925, Term.

No. 9548.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOE BORG, L. H. BURNS, and JESSE DONOVAN, *alias* J. F. DONOVAN, *alias* JESS F. O'CONNELL,
Defendants.

INFORMATION.

BE IT REMEMBERED, that Thos. P. Revelle, Attorney of the United States of America for the Western District of Washington, who for the said United States in this behalf prosecutes in his own person, comes here unto the District Court of the said United States for the District aforesaid on this 5 day of May, in this same term, and for the said United States gives the Court here to understand and be informed that,— [22]

COUNT I.

That on the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-four, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, JOE BORG, L. H. BURNS, and JESSE DONOVAN, *alias* J. F. DONOVAN, *alias* JESS F. O'CONNELL (whose true and full names are to the said United States Attorney unknown), then and there being, did then and there knowingly, willfully, and unlawfully sell certain intoxicating liquor, to wit, eight (8) ounces of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said sale by the said Joe Borg, L. H. Burns, and Jesse Donovan, as aforesaid, was then and there unlawful and prohibited by the Act

of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [23]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT II.

That on the sixteenth day of October, in the year of our Lord one thousand nine hundred and twenty-four, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, JOE BORG, L. H. BURNS, and JESSE DONOVAN, *alias* J. F. DONOVAN, *alias* JESS F. O'CONNELL (whose true and full names are to the said United States Attorney unknown), then and there being, did then and there knowingly, willfully, and unlawfully sell certain intoxicating liquor, to wit, eight (8) ounces of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said sale by the said Joe Borg, L. H. Burns, and Jesse Donovan, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and

against the peace and dignity of the United States of America. [24]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT III.

That on the twenty-fourth day of October, in the year of our Lord one thousand nine hundred and twenty-four, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, JOE BORG, L. H. BURNS, and JESSE DONOVAN, *alias* J. F. DONOVAN, *alias* JESS F. O'CONNELL (whose true and full names are to the said United States Attorney unknown), then and there being, did then and there knowingly, willfully, and unlawfully sell certain intoxicating liquor, to wit, eight (8) ounces of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said sale by the said Joe Borg, L. H. Burns, and Jesse Donovan, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [25]

And the said United States Attorney for the said

Western District of Washington further informs the Court:

COUNT IV.

That on the thirty-first day of October, in the year of our Lord one thousand nine hundred and twenty-four, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, JOE BORG, L. H. BURNS, and JESSE DONOVAN, *alias* J. F. DONOVAN, *alias* JESS F. O'CONNELL (whose true and full names are to the said United States Attorney unknown), then and there being, did then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit, sixteen (16) ounces of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, intended then and there by the said Joe Borg, L. H. Burns, and Jesse Donovan, for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away, and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said Joe Borg, L. H. Burns, and Jesse Donovan, as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case

made and provided and against the peace and dignity of the United States of America. [26]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT V.

That prior to the commission by the said JESSE DONOVAN, *alias* J. F. DONOVAN, *alias* JESSE F. O'CONNELL, of the said offense of possessing intoxicating liquor herein set forth and described in the manner and form as aforesaid, said JESSE DONOVAN, *alias* J. F. DONOVAN, *alias* JESS F. O'CONNELL, on the 12th day of September, 1922, in cause No. 6986 at Seattle, in the United States District Court for the Western District of Washington, Northern Division, was duly and regularly convicted of the offense of possessing intoxicating liquor on the 19th day of June, 1922, in violation of the said Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [27]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT VI.

That on the eighth day of November, in the year of our Lord one thousand nine hundred and twenty-four, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, JOE BORG,

L. H. BURNS, and JESSE DONOVAN, *alias* J. F. DONOVAN, *alias* JESS F. O'CONNELL (whose true and full names are to the said United States Attorney unknown), then and there being, did then and there knowingly, willfully, and unlawfully sell certain intoxicating liquor, to wit, eight (8) ounces of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said sale by the said Joe Borg, L. H. Burns, and Jesse Donovan, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [28]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT VII.

That from the fourth day of October, to the eighth day of November, in the year of our Lord one thousand nine hundred and twenty-four, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, and at a certain place situated at 1510–12th Avenue, in the said City of Seattle, JOE BORG, L. H. BURNS, and JESSE

DONOVAN, *alias* J. F. DONOVAN, *alias* JESS F. O'CONNELL (whose true and full names are to the said United States Attorney unknown), then and there being, did then and there and therein knowingly, willfully, and unlawfully conduct and maintain a common nuisance by then and there manufacturing, keeping, selling, and bartering intoxicating liquors, to wit, distilled spirits, and other intoxicating liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, and which said maintaining of such nuisance by the said Joe Borg, L. H. Burns, and Jesse Donovan, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,
United States Attorney.
J. W. HOAR,
Assistant United States Attorney.

[Endorsed]: Filed May 5, 1925. [29]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare record on appeal consisting of

1. Writ of scire facias.
2. Return to writ of scire facias.
3. Bill of exceptions with exhibits attached thereto.
4. Order extending time for filing bill of exceptions.
5. Judgment.
6. Assignments of error.
7. Notice of appeal.
8. Citation on appeal.
9. Waiver of jury.
10. Supersedeas bond on appeal.
11. This praecipe.

CALDWELL & LYCETTE,
Attorneys for Appellant.

NOTICE.

Attorneys will please indorse their own filings, Rule 11.

[Endorsed]: Filed May 12, 1928. [30]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 30, inclusive, to be a full, true, correct and complete

copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [31]

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 62 folios, at 15¢	$9.30
Certificate of Clerk to Transcript of Record, with seal	.50
Total	$9.80

I hereby certify that the above cost for preparing and certifying record, amounting to $9.80, has been paid to me by the attorney for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court,

at Seattle, in said District, this 17th day of May, A. D. 1928.

[Seal] ED. M. LAKIN,

Clerk United States District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [32]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

To the UNITED STATES OF AMERICA, Plaintiff, and to THOS. P. REVELLE, PAUL D. COLES and DAVID L. SPALDING, Its Attorneys:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, to be held at the City of San Francisco, State of California, in the Ninth Judicial Circuit, on the 23d day of May, 1928, pursuant to a notice of appeal filed in the office of the Clerk of the above-entitled District Court, appealing from the final judgment signed and filed herein on the 9th day of March, 1927, wherein the United States of America is plaintiff and the National Surety Company, a corporation, is defendant and appellant; to show cause, if any there be, why the judgment rendered against the said appellant as in said notice of appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, United States District Judge for the Western District of Washington, Northern Division, this 23 day of April, 1928.

[Seal] JEREMIAH NETERER,
United States District Judge.

Copy received.

PAUL D. COLES,
Asst. U. S. Atty.

[Endorsed]: Filed Apr. 23, 1928. [33]

[Endorsed]: No. 5497. United States Circuit Court of Appeals for the Ninth Circuit. National Surety Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 21, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5497

NATIONAL SURETY COMPANY, a corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Appellant's Opening Brief

CALDWELL & LYCETTE,
Attorneys for Appellant.

1311 Alaska Building
Seattle, Washington

MARTIN & DICKSON, *Printers*

In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5497

NATIONAL SURETY COMPANY, a corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Appellant's Opening Brief

This appeal was affected by filing a notice of appeal, assignments of error, bond and citation on appeal, on April 23, 1928, prior to the return to the rules requiring a petition and order allowing appeal.

The appeal involves only questions of law. The testimony is extremely short and undisputed. A written waiver of jury was filed. (Tr. 8.)

The appeal is from a judgment in favor of the United States after a hearing on a contested writ of scire facias on a bail bond.

STATEMENT OF THE CASE
PLEADINGS

Writ of scire facias (Tr. 1-3)—The writ (complaint) alleges that on February 5, 1925, a $750 bail bond was executed by Larry Burns and the National Surety Company, appellant, conditioned for the appearance of Burns in the district court at Seattle, during the *May,* 1925, term, from time to time and term to term thereafter, to answer a charge *exhibited* against him; that thereafter, on September 8, 1925, said Burns being called to answer said charge came not, but defaulted; that on motion of the government it was considered by the court that Burns and the National Surety Company forfeit and pay to the United States $750, according to the tenor of said bond, unless they show cause to the contrary. Then follows the command to appear and show cause why the judgment nisi should not be made absolute.

Return and answer (Tr. 4). The answer denied that the bond was conditioned as alleged; and denies that Burns was called at any proper time; and denies that any default was made. And alleges affirmatively: *First affirmative defense*—no charge was filed against Burns until May 15, 1925, which was three months after the date on which the defendant was bound by said bond to appear, and in the next term of court.

Second affirmative defense (Tr. 6) alleges:

> "That the charge for which said defendant was bound by his said bond to appear was the charge of having 'on or about November 21, having violated the National Prohibition Act', while the charge which was filed against said defendant was the charge of having 'on October 4, October 16, October 24, October 31 and November 8, violated the National Prohibition Act' none of which alleged violations were on or about November 21, as provided for in said bond."

Third affirmative defense (Tr. 6) alleges:

> "That on May 26, 1925, said defendant appeared in said court and plead guilty to two of the counts filed against him, and thereby fulfilled the condition of his said bond."

Reply—no reply was filed.

EVIDENCE

The bill of exceptions (Tr. 15-18)—plaintiff offered the bond, exhibit 1 (Tr. 19), in evidence, and

also offered in evidence a line from the clerk's docket as follows (Tr. 16), "showing that on May 26th the defendant Burns revised his plea to guilty to counts one and two; all other counts were dismissed; that on May 26th an order was entered by the court setting date of June 1st, 1925, for judgment and sentence. On June 1st, on Burns' assent, it was continued one week. On June 8th an order was entered putting over sentence to September 1st, 1925; it does not appear at whose request. Judgment was put over until that time, and on September 1st the court entered an order putting judgment and sentence over one week; on September 8th continuance of sentence was denied, and bail forfeited nisi and bench warrant issued for Burns."

The government then rested. Motion was made by the defendant for a non-suit for the reason that the evidence does not justify making the judgment absolute, and shows affirmatively that the government is not entitled to judgment absolute (Tr. 17).

The court then stated that it had not been proved that the defendant had been called. Thereupon journal entry of September 8 was read, as follows: "Now on this 8th day of September, 1925, the above defendant is called for sentence and not responding is called

three times in the corridor of the court. Not responding, bail is forfeited nisi and bench warrant issued." The government then rested. Motion for non-suit was renewed, but denied. Defendant then offered in evidence the criminal complaint in the action, which was marked filed May 5, 1925 (Tr. 17). Defendant rested.

Argument followed (Tr. 18) and the court took the matter under advisement, and finally entered judgment for the plaintiff, making the forfeiture absolute, to which an exception was taken and allowed. (Tr. 18.)

Formal written judgment was thereafter entered and an exception taken (Tr. 8-11).

ASSIGNMENTS OF ERROR (Tr. 12)

Error was assigned as follows: (1) the court erred in refusing to grant the appellant's motion for non-suit; (2) the court erred in granting judgment for the plaintiff; (3) the court erred in refusing to grant judgment for the defendant dismissing the action.

The assignments of error raised practically a single question: Do the admitted facts justify the judgment?

ARGUMENT

NATURE OF SCIRE FACIAS

Scire facias on a bail bond is the commencement of a new and original civil action. The writ is the complaint. Defendant must answer and may set up any matter of defense. Plaintiff must prove all the material allegations of his complaint.

Hollister v. U. S., 145 Fed. 773, 779;

Kirk v. U. S., 124 Fed. 324;

Kirk v. U. S., 131 Fed. 331;

Winder v. Caldwell, 14 L. Ed. 487, 491;

U. S. v. Hall, 37 L. Ed. 332; 147 U. S. 687;

Universal Transport Co. v. National Surety Co., 252 Fed. 293;

Davis v. Packard, 8 L. Ed. 684;

Dixon v. Wilkinson, 11 L. Ed. 491;
24 *R.C.L.* 676, Sec. 17;

3 *R.C.L.,* 65, Sec. 80;

35 *Cyc.* 1152-4-8;

Foster on Federal Practice, pp. 2379-83.

In *Kirk v. U. S.,* 124 Fed. 324, it is said, p. 336:

> "In scire facias proceedings properly instituted by due service, the defendant may appear and plead and have a trial of all questions and matters of defense, and the proceeding is but a suit to enforce the penalty of the recognizance,

> and differs from any other suit to enforce it only in the process by which it is commenced."

The burden of proof is on the plaintiff, and it must prove all the essential allegations of the writ (complaint) by competent evidence. The record on which the writ is issued is not a part of the writ, but must be introduced in evidence to prove the case. When introduced it must support the allegations of the writ or the plaintiff fails. See cases cited above.

Hollister v. U. S., 145 Fed. 773, contains a complete discussion of scire facias. It is there laid down that the record on which the case issues is not a part of the case, but is evidence which must be introduced to prove the case. In that case it is said, after discussing Supreme Court decisions, at p. 780:

> "From the principles announced in the foregoing authorities certain conclusions inevitably follow: First, the record upon which the writ issues is not a part of the declaration. *It is the evidence* on which plaintiff must rely to prove the case, and the legal sufficiency of the declaration must be determined, as in ordinary cases of pleading, from the consideration of its averments."

The court then points out, p. 781, that the records must be offered in evidence to prove the facts alleged, saying:

> "The record, when offered to prove the case, must disclose them or the case fails."

It was further held that on a denial the case presents a question of fact requiring a trial by jury.

In *Hunt v. U. S.* 61 Fed. 795, an action of scire facias on a bail bond, the question arose as to how to prove the allegations of the writ. The court said:

> "A writ of scire facias, when issued, should only recite facts disclosed by the records and files of the court from which the writ eminates. Therefore, when the defendants named in the writ of scire facias, by way of defense thereto, deny any of its recitals, *it is incumbent on the plaintiff to verify the same by producing the records and files, and the facts in question cannot be otherwise proven* * * *."

THE PLAINTIFF FAILED TO PROVE THE ESSENTIAL ALLEGATIONS OF ITS WRIT (COMPLAINT)

I.

PLAINTIFF FAILED TO PROVE THAT THE SURETY WAS CALLED TO PRODUCE THE DEFENDANT.

The plaintiff offered proof indicating that the defendant was called; but failed to offer any evidence that the surety was called. The bond being a joint and several obligation, this was necessary. In 3 R.C.L., p. 62, Sec. 75, it is said:

"Where the recognizance in its form is several rather than joint, it seems that it is necessary that each recognizance, namely, that of the surety as well as that of the principal, should be separately forfeited in the usual manner. The prisoner should be called to appear, and the bond should be called to bring forth the body of the prisoner whom he undertook to have there that day, or forfeit his recognizance.

II.

Plaintiff Failed to Prove the Judgment Nisi as Alleged

It is true that the plaintiff read in evidence a line from the clerk's docket (Tr. 17), to the effect that: "The bail is forfeited nisi and bench warrant issued." This is not sufficient, as it does not mention against whom the judgment was rendered—or the amount—nor does it have any of the requisites of a judgment sufficient to sustain a scire facias.

In pleading the judgment nisi it is necessary to state with great particularity the details concerning the alleged judgment. 24 R.C.L. p. 677, Sec. 18.

The judgment nisi must be proved.

Nelson v. State, 73 S. W. 398;
General Bonding Co. v. State, 165 S. W. 615;
Hunt v. U. S., 61 Fed. 795;
McWhorter v. State, 14 Tex. App. 239.

The particularity with which the judgment nisi must be proved is shown by the following cases, in which it is held that any variance between the judgment offered and the judgment alleged is fatal:

Farris v. People, 58 Ill. 26;
Eckert v. Phillip, 4 Pa. Co. Ct. 514;
Highsaw v. State, 19 S. W. 762;
Bolinger v. Bower, 14 Ark. 27;
Avant v. State, 26 S. W. 411;
Smith v. State (Miss.), 25 So. 491;
Dailey v. State, 22 S. W. 4;
Brown v. State, 11 S. W. 1022.

This judgment is not even definite as to which defendant was called. The information (Tr. 20) shows there were three defendants in cause No. 9548, and the judgment nisi should at least be certain that Larry Burns was the defendant called.

The writ (Tr. 2), alleges that the judgment was to pay $750 to the United States, but the proof offered does not support the allegations, nor does it show any amount.

III.

The Uncontradicted Record and Evidence Affirmatively Show that Burns Fully Complied with the Terms of His Bond, and that no Default was Made

The plaintiff's evidence shows (Tr. 16) that on May 26 Burns appeared and plead guilty to counts 1 and 2 of the information, and that the rest of the counts were dismissed. It was then shown (Tr. 16) that judgment and sentence on counts 1 and 2 were continued from time to time until September 8, at which time it is claimed Burns failed to appear for sentence, on counts 1 and 2, to which he had plead guilty.

Were these two charges covered by the bond?

On examining the bond (Tr. 19), it will be found that the condition was to answer an offense committed on or about *November* 21, 1924, thus (Tr. 19):

> "Then and there answer the charge of having, on or about the 21st day of November, A. D. 1924, within said district, in violation of Section ..... of the N. P. A. (Act of .....) (Criminal Code) (Revised Statutes) of the United States, unlawfully, knowingly and wilfully maintain a common nuisance and have, possess and sell certain intoxicating liquor."

Examining the information (Tr. 21) it will be found that Burns and two others were charged with seven separate and distinct charges, as follows: Count I (Tr. 21) on *October* 24th, 1924, the sale of intoxicating liquor; Count II (Tr. 22) on *October* 16, 1924, sale of intoxicating liquor; Count III (Tr. 23) on *October* 24, 1924, sale of intoxicating liquor; Count IV (Tr. 24) on *October* 31, 1924, possession with intent to sell; Count V (Tr. 25), prior conviction; Count VI (Tr. 25), on *November* 8, 1924, sale of intoxicating liquor; Count VII, (Tr. 26) from *October* 4 *to November* 8, 1924, maintaining a nuisance.

As stated, on May 26, 1925 (prior to the forfeiture), Burns appeared and plead guilty to counts 1 and 2, and the other counts were dismissed (Tr. 16). Thus the government dismissed all charges or offenses occurring after October 16, 1924, and these were several running into November. The bond was to answer an offense committed on *November* 21, 1924, and not any one of the many offenses occurring prior to that date.

Consequently, on September 8, 1925, *when the bond was forfeited, there was no charge covered by the bond pending against Burns.*

It might well be said that no charge covered by the bond was ever filed against Burns. Seven other separate and distinct charges were filed, but not one covered by the bond, as no charge is made for November 21.

IV.

In Any Event the Bond was Discharged Because the Charge Brought Against Burns was Different than the Charge Covered by the Bond

As shown above, the bond covers an offense committed on or about November 21. The charge filed was for seven different offenses. This is fatal.

> *Dillingham v. U. S.*, 7 Fed. Cas. No. 3913;
> 6 *C. J. p.* 1001-2; 1029.

In *Dillingham v. U. S., supra,* it was held that the bond was void where a different charge was brought from that stated in the bond.

In 6 *C. J.* p. 1001, it is said:

> "In the absence of a statute otherwise, where the offense stated in the bail bond or recognizance is different from that with which the accused stands charged, it will invalidate the undertaking, unless the variance is an immaterial one."

At p. 1002 it is said:

> "If the variance (between information and bond) is a substantial one, and the bond or recog-

nizance names or describes a different offense from that charged in the indictment, although it describes one of the same general class or nature, the sureties will not be bound."

This rule is reasonable because the contract is to produce the defendant to answer one charge, not another.

V.

The Bond was Discharged for Failure to Call the Defendant at any Proper Time

This bond was strictly a one term bond. It did not contain the "term to term" condition; it required the defendant to "appear on the ..... day on the November term to be begun and held * * * on the 9th day of February, 1925."

Burns was not called during the November, 1924, term, but only on September 8 (if at all). This was at a different term and not covered by the bond. The information itself was not filed during the November term.

A.—*This discharged the surety. A bond conditioned for appearance at a specified term, and which does not contain the term "term to term," does not bind the surety after the term specified.*

U. S. v. Mace, 281 Fed. 635 (8 CCA);

U. S. v. Keiver, 56 Fed. 422;

U. S. v. Backland, 33 Fed. 156;

Reese v. U. S., 19 L. Ed. 541;

6 *C. J.* 1035, 1038;

3 *R.C.L.* p. 41, Sec. 47;

Arnstein v. U. S., 296 Fed. 946;

Joelson v. U. S., 281 Fed. 106 (3 CCA).

In 6 *C. J.* it is stated, at p. 1035:

"As a general rule, when the bond or recognizance specifies the term and place at which the accused is to appear, he is not bound to appear, and the bond or recognizance cannot be forfeited for his failure to appear at any other term or place. Thus in such a case he is not, as a general rule, bound to appear before any other court, or at any other place, or during any other term or day than that specified in the undertaking; and it has been held that if the time of holding the court is subsequently changed from the day set by it, a failure to appear on the day which it is changed does not operate as a forfeiture."

And, at page 1038, it is said:

"But where the obligation of the bond is not a continuing one (term to term), the bail are entitled to discharge at the term designated for appearance. Thus, it has been held that, where the condition is for appearance at the next term and from day to day, it applies only to that particular term of court, and that an adjournment

to a subsequent term is not within the contract of the recognizance, and operates to discharge it."

In 3 *R.C.I.*, p. 41, Sec. 47, it is stated:

"Ordinarily recognizances or bail bonds obligate the surety to procure the appearance of their principal at the time, and not at any subsequent term. Where recognizance in a criminal case is conditioned 'that the principal appear at the next term and thereafter from day to day and not depart without leave,' or contains the further condition that he 'shall abide the judgment of the court,' the surety is bound for the appearance of the prisoner during the first term of the court only, and if court adjourns without making any order, the sureties are exonerated from their recognizance."

B.—*The bail is discharged under the state laws.*

The conditions of a bail bond in the federal court are governed by the laws of the state in which the federal court is located.

Rev. Stat. Sec. 1014; *U. S. Comp. Stat. Sec.* 1674;

U. S. v. Ewing, 140 U. S. 142, 35 L. Ed. 388;

U. S. v. Patterson, 150 U. S. 67; 37 L. Ed. 997;

U. S. v. Keiver, 56 Fed. 422;

U. S. v. Mace, 281 Fed. 635;

U. S. v. Sauer, 73 Fed. 671.

Under the rule just stated it has been held, in the cases cited, that the requisites of a bail bond in the federal court are governed by the laws of the state. If, under the state laws and decisions a certain act discharges the bail, that the same acts discharge the bail in the federal court.

It is necessary, then, to examine the state statute regarding bail:

Rem. Comp. Stat. Sec. 2311, provides:

> "Whenever a person has been held to answer to any criminal charge, if an indictment be not found or information filed against him within thirty days, the court shall order the prosecution to be dismissed, unless good cause to the contrary be shown."

And Rem. 2312:

> "If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown."

In this case the information was not filed within thirty days after giving the bail, nor was the defendant called within sixty days after the filing of the information. On the contrary, many months elapsed.

Decisions of the state courts construing state statutes are binding rules of decisions for the federal court. Rev. Stat. Sec. 721; *Comp. Stat.* Sec. 1538.

The surety is discharged under Washington decisions.

State v. Lewis, 35 Wash. 261, 77 Pac. 198;

State v. Caruso, 137 Wash. 519, 529, 243 Pac. 14.

In *State v. Lewis, supra,* the Washington statutes requiring the filing of the information within thirty days and bringing the defendant to trial within sixty days, were held *mandatory.* In that case the bail was forfeited prior to the filing of the information, but the court held that, the statute being mandatory, the sureties were entitled to protection of the statute, and failure of the state to file the charge released the surety.

VI.

The Bond Produced was Conditioned Differently Than the Bond Sued on

As shown above, the bond produced in evidence was not a "term to term" bond. The writ (Tr. 2) alleges a "term to term" bond. This was a fatal variance.

VII.

Continuing a Case Indefinitely After a Plea of Guilty Discharges the Surety

Burns plead guilty on May 26. This put him in the custody of the law so that an indefinite continuance of his case to September 8 unjustly and unduly prolonged the risk of the surety, and the surety was thereby discharged.

SUMMARY

We respectfully submit that the judgment should be reversed with instructions to dismiss the action because:

(1) There was no proof whatsoever that the surety was called to produce the defendant;

(2) There was no proof of the judgment nisi;

(3) The uncontradicted evidence affirmatively shows that the defendant fully complied with the terms of the bond, and that no default was made;

a. The defendant appeared and plead guilty to two counts of the information;

b. That part of the seven charges brought against the defendant, which were possibly covered by the bond, were dismissed prior to the alleged forfeiture.

(4) In any event the bond was discharged because the seven charges brought against defendant were more and different than the charge covered by the bond;

(5) The bond was discharged (a) for failure to call the defendant at the term specified in the bond; (b) for failure to file a charge against the defendant during the term specified in the bond;

(6) The bond produced was materially different from the bond alleged:

a. The bond produced was a time to time bond only; and the bond alleged was a term to term bond.

(7) Continuing the case indefinitely after a plea of guilty discharged the surety.

Respectfully submitted,

CALDWELL & LYCETTE,

Attorneys for Appellant.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5497

NATIONAL SURETY COMPANY,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF THE UNITED STATES OF AMERICA, APPELLEE

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BRIEF OF THE UNITED STATES OF AMERICA, APPELLEE

STATEMENT OF THE CASE

The facts in the case at bar are substantially those as set forth on Page 2 of Appellant's brief. This matter is on appeal from a judgment of the United States District Court for the Western District of Washington, Northern Division, making a judgment *nisi* on a bail forfeiture absolute.

An answer was filed by the National Surety Company, surety on the bond, and, the issues having been joined, the case came on for hearing before Judge Neterer.

ARGUMENT

The decisions cited on Page 6 of Appellant's brief, holding that *scire facias* on a bail bond is a commencement of the civil action, are apparently the law.

I.

On page 8 of appellant's brief it is contended that plaintiff in this case, at the trial in the lower court, failed to prove that the surety was called to produce the defendant. The Government's answer with reference to this contention is simply that it is not now, or never has been, necessary to call the surety to produce the defendant, or even necessary to give the surety notice to produce the defendant.

In support of appellant's contention, he cites a quotation from 3 R. C. L., Page 62, Section 75, which states in substance that where a recognizance is in form several rather than joint, it is necessary to call the surety. Such citation, however, is not applicable here.

The bond in the first paragraph states that the principal and surety obligate themselves jointly and severally (Tr. 19). In *Southern Surety Company vs. The United States*, 23 Fed. 2d, 55, it was held that it was no defense to the forfeiture that the surety was not called to produce the principal or that the bond was not forfeited at all as against the defendant surety.

At 6 C. J. 1046, we find the following statement: "It has been held that if there has been a default on the part of the principal, he is the only one to be called and notified and that a forfeiture of the recognizance may be declared or entered without calling the sureties and without previous notice to them, unless such notice is required by statute. It has also been held that no notice need be given the surety to produce the principal on the day bail is forfeited."

II.

On page 9 of appellant's brief it is stated that plaintiff failed to prove the judgment *nisi* as alleged, and on into page 10, it is contended that the minute entry offered in evidence as follows: "the bail is forfeited nisi and bench warrant issue," (Tr. 17) was not sufficient as it does not mention against whom the judgment was

rendered, nor the amount, nor does it have any of the other requisites of a judgment *nisi* sufficient to sustain a scire facias.

It is contended by the Government that the authorities cited by counsel for appellant do not bear out appellant's contention, and it is contended also that the following authorities cited by the Government are pertinent and should leave no doubt in the court's mind as to this contention on the part of the appellant.

In *Southern Surety Company vs. United States of America*, 23 Fed. 2d, 55, the final judgment was entered although no forfeiture was ever alleged against the surety company. It was held, that it was not necessary to plead or prove a judgment nisi as against a surety on a bail bond at the time of a trial of the forfeiture of the same.

In *People vs. Tidmarsh*, 113 Ill. App. 153, it was held that an order as follows: "and now it is by the court ordered that recognizance herein be, and is now forfeited," was held a sufficient formal declaration of a forfeiture. To the same effect is the case of *Banta vs. The People,* 53 Ill. 434. In the *Banta* case the court held that an order of forfeiture as follows was held proper: "It is, therefore, considered by the court that

the recognizance of the said defendant be, and is hereby declared to be forfeited and that the default of said defendant and of his securities be entered of record and that scire facias issue herein against the said Jonathan Way and Jordan Banta and Tilman Lane, returnable to the next term of this court requiring the said defendant and his securities then and there to appear to show cause why the People should not have judgment and execution upon their said recognizance according to its form in force and effect thereof."

In *State vs. Eyermann*, 72 S. W. 539, it was held that it is not necessary that an order declaring a forfeiture of a recognizance state the amount of the forfeiture, especially in view of Revised Statute 1899, Section 2800, providing that a proceeding on a recognizance shall not be defeated on account of any defect of form or other irregularity. This case also held that where the accused had two bail bonds for his appearance for different cases, it was not necessary for the judgment *nisi* to plead which one was forfeited.

In connection with the *Eyermann* case cited above, the Government at this time wishes to call to the court's attention Remington Compiled Statutes of the State of

Washington, 1922, Section 777, which provides in substance that no forfeiture of any bail bond shall fail for any minor defect or other irregularity.

III.

On Page 11 of appellant's brief, appellant begins with a contention that the uncontradicted record and evidence affirmatively shows that Burns fully complied with the terms of his bond and that no default was made. It is contended by the appellant that the bond offered in evidence is not conditioned for the appearance of the defendant on the same date as the offense charged in the information. It is evident from the record herein (Tr. 16) that there was no objection on the part of the appellant herein to the admission of the bail bond in evidence when said bail bond was offered by the Government (Tr. 16). If there is a variance between the bond and the information, the defendant waives the variance and acknowledges the same is not fatal by failure to object to the bond at the time it was offered in evidence. 6 C. J. 1073, *Wellborn vs. The People*, 76 Ill. 516. Appellant contends that the bond was to answer an offense committed on or about November 21, 1924, and that, inasmuch as there was no charge ex-

isting against the defendant after October 16, 1924, there was a fatal variance between the information and the bond.

It often happens that bail bonds are signed prior to the time that the indictment or information is filed against the defendant. Thus in many times and cases it is impossible to indict or inform against the defendant on all counts for crimes for the exact date mentioned as the date of commission of the various crimes in the bond. See *Wells vs. Terrell,* 49 S. E. 319.

At 6 C. J. 1002, we find the following statement:

"The fact that the description of the offense in the bail bond or recognizance varies from that set forth in the information or indictment will not avoid the undertaking if it in substance describes the offense charged."

In *Blaine vs. State,* 31 S. W. 366, it was held that where a bail bond erroneously stated the date of the indictment under which the accused stood charged, the mistake was immaterial.

In *People vs. Richardson,* 187 Ill App. 634, it was held that where a bail bond was given on October 15, 1912, requiring the appearance of the accused at the next term of court to be held on June 6, 1912, instead

of 1913, the mistake could not render the bond a nullity; and it was also held that the parties to the criminal action were bound to know at their peril which was the first day of the next term.

IV.

On page 13 of appellant's brief, it is contended that in any event the bond is discharged because the charge brought against Burns was different than the charge covered by the bond. We believe that our argument with reference to the last point herein sufficiently answers the contention of the appellant herein and proves that there is not, in the case at bar, a fatal variance between the bond and the information herein. It is believed that the appellant has waived his rights to object on the ground of a fatal variance in this case, on account of the fact that when the bond was offered in evidence in this case (Tr. 16) no objection was made by the appellant.

In *Lewis vs. State*, 39 S. W. 570, it was held that an objection that there is a variance between the bond and the recitals in the writ of scire facias is waived unless there is an objection to the admission of the bond in evidence.

Where the offenses are different degrees of the same class or where the indictment is for an offense of a higher grade than that described in the undertaking and includes the latter offense, or arose out of the same act or transaction, the bail are not released, 6 C. J. 1030.

It is the Government's contention in this case that there is no fatal variance between the bond and the information herein, on account of the fact that both charged offenses in violation of the National Prohibition Act and both the offenses in the bond and the offenses alleged in the information arise out of the same act and transaction and therefore the surety on the bond in the case at bar is not released.

V.

On page 14 of appellant's brief it is contended that the bond in the case at bar was discharged for failure to call the defendant at any proper time. It has been stated in appellant's brief that the bond in the case at bar was a one term bond and did not contain the "term to term" condition and it required the defendant to appear during the November, 1924, term. Counsel for appellant cites cases holding that a bond conditioned for appearance at a specified term, which does not contain the condition to appear from "term to term" does

not bind the surety after the time specified. *United States vs. Mace*, 281 Fed. 635; *United States vs. Keiver*, 56 Fed. 422; *Joelson vs. United States*, 281 Fed. 106.

The Government at this time wishes to call the court's attention to the case of *The United States vs. Duke*, 5 Fed. 2d 825, decided by Judge Neterer, which is a forfeiture of a bail bond. The *Joelson* and the *Mace* cases are analyzed and discussed.

In the *Duke* case Judge Neterer held that a surety on a bond conditioned that the defendant would appear at a term of court "to be begun and held on the first day of February, 1924," was held liable on defendant's failure to appear at the May term of court, though there was no term held in February. In view of Remington's Compiled Statutes of the State of Washington, 1922, Section 1957, it was held the statute became part of the bond and required that the defendant appear to answer charges against him at all times until discharged, according to law.

Section 1957, Remington's Compiled Statute of the State of Washington, 1922, provides as follows: "The recognizance shall be conditioned in effect that the defendant will appear to answer said charge whenever

the same shall be prosecuted and at all times until discharged, according to law, render himself amenable to the orders and process of the Superior Court and if convicted, render himself in execution of the judgment." It is pointed out by the court in the *Duke* case that the statute mentioned herein became a portion of the bond, which in effect was a contract between the Government and the surety to produce the defendant, not at any term of the court "but at all times until discharged according to law."

The *Mace* and *Joelson* cases are distinguished and held not to be in point because the interpretation of the bonds in said cases was governed by the respective statutes of the states in which the bonds were executed.

A bail bond which requires the defendant to appear from time to time means just the same as if term to term were specified. *The United States vs. Fletcher*, 279 U. S. 163.

In the case of *United States vs. Davenport*, 266 Fed. 427, it was held there seems no reason for a strict or highly technical construction of law in failure of the defendant, and that this kind of action does not involve the guilt or innocence, conviction or acquittal of anyone. It is not a criminal case. Upon the failure of the prin-

cipal to appear, the sureties become debtors. *United States vs. Sanges*, 144 U. S. 310, 36 L. Ed. 445; *United States vs. Zarafonitis*, 150 Fed. 97, 80 C. A. A. 51.

It would therefore seem that the principal in the case at bar was called at a proper time.

VI.

On page 16 of appellant's brief it is contended that the bail is discharged under the state laws. The Government admits that the conditions of a bail bond in the federal court are governed by the laws of the state in which the bond is executed. Two state statutes are cited in appellant's brief; the first one is as follows: Remington's Compiled Statutes, 1922, Section 2311, which provides: "Whenever a person has been held to answer to any criminal charge, if an indictment be not found or information filed against him within thirty days, the court shall order the prosecution to be dismissed unless good cause to the contrary be shown."

Remington's Compiled Statute, 1922, Section 2312, provides: "If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty

days after the indictment is found or the information filed, the court shall order it to be dismissed unless good cause to the contrary is shown."

In the case at bar, it is contended that inasmuch as the information was not filed within thirty days after the arrest of the defendant and, inasmuch also as the defendant was not brought to trial within sixty days after the information was filed, the surety on the bond in question is released, and the above mentioned statute inured to the benefit of the surety.

In substantiation of the appellant's contention the following cases are cited: *State vs. Lewis*, 35 Wash. 261; *State vs. Caruso*, 137 Wash. 519.

Neither of these cases is in point. However, an examination of both of them will show that in both, the information against the defendants was dismissed and that such a dismissal inured to the benefit of the surety. In the case at bar the information has not been dismissed and the record shows affirmatively that no motion for the dismissal of the same for want of prosecution was ever interposed.

Remington's Compiled Statute, 1922, Section 1957, already quoted herein, provides in substance that the bond is effective until defendant is discharged accord-

ing to law. In the case at bar, the defendant was never dismissed from the the information filed against him in the federal court prior to or after the forfeiture of his bail bond for his appearance at the time of sentence.

Remington's Compiled Statute, 1922, Section 2313, provides that: "Whenever the court shall direct any criminal prosecution to be dismissed, the defendant shall, if in custody, be discharged therefrom, or if admitted to bail, his bail should be exonerated and if money has been deposited instead of bail, shall be refunded to the principal depositing the same."

Can it not be inferred from the above mentioned statute that the only method in the state court of exonerating bail bonds is by the dismissal of the main criminal charge against the main defendant.

In *United States vs. Davenport*, 266 Fed. 427, it was held: "It is no defense to the surety on the defendant's bond that the criminal prosecution against the defendant is barred by time," the court holding the sureties undertaking is to answer for the appearance of the defendant, and the sureties' obligation is not affected by the question of whether or not the defendant's criminal prosecution is barred by the statute of limitations.

To the same effect is a case in the Ninth Circuit, *United States vs. Dunbar,* 83 Fed. 151. On page 154 of said decision the court stated as follows:

"Whether the offenses with which William Dunbar were charged were barred by lapse of time could only be determined in the prosecution against him. The undertaking of the sureties was to answer for his appearance. That obligation did not at all depend upon or involve the question of whether the prosecution of the respective offenses was barred by lapse of time."

Recurring to the general principle that the condition of the recognizance should be performed it follows that if the principal fails to appear according to the obligation, the bond or recognizance is forfeited whether or not there is an indictment or information, for ordinarily the discharge is a matter for the court and does not result as from course from failure to indict or to proceed by information; and this rule governs where, upon failure to indict, the accused is ordered to appear before a second Grand Jury. 6 C. J. 1028.

In view of the foregoing citations it is submitted that appellant's contention that the bail herein is discharged under the state laws is without any merit whatsoever.

VII.

On page 18 of appellant's brief it is contended that recovery was erroneously granted the plaintiff herein on account of the fact that the bond produced was conditioned differently than the bond sued on. Inasmuch as the bond produced was not a term to term bond, and the writ herein alleged a term to term bond, appellant contends that this was a fatal variance. In the cases of *United States vs. Duke, supra;* and *United States vs. Fletcher, supra,* it was held that the words term to term are not necessary in a bond to grant recovery. In the cases here the facts are parallel to the facts in the case at bar. Therefore it is contended by the Government in this case that the words "term to term" are an unnecessary portion of the writ herein and can be ignored as superplusage.

A variance which could not have surprised or prejudiced the adverse party could not be contended as material. 6 C. J. 1070.

It is the Government's contention also that counsel cannot, at this time, raise a question of variance between the writ and the bond offered in evidence when no objection was made to the admission of the bond in

evidence. See *Lewis vs. State*, 39 S. W. 570; 6 C. J. 1073; *Wellborn vs. People*, 76 Ill. 516.

It will be seen that the defendant at the time of trial herein did not object to the admission of the bond in evidence (Tr. 16).

The appellee also contends vigorously that on an appeal from the judgment of the lower court as in this case, the appellant has waived his right to have the upper court decide whether or not the evidence before the lower court was sufficient to sustain the judgment, on account of the fact that after the defendant moved for a nonsuit at the end of plaintiff's case, defendant introduced defense testimony and failed to renew his motion for nonsuit or for dismissal at the end of all the testimony. According to the decisions of the Federal Courts, which are legion on this point, the insufficiency of the evidence cannot be questioned above, when the motion for nonsuit by the defendant has not been renewed at the end of the defendant's case. *Gilson vs. F. S. Royster Guano Company*, 1 Fed. 2d 82; *Columbia and Puget Sound R. R. Co. vs. Hawthorne*, 144 U. S. 202, 36 L. Ed. 405; *Bunker Hill Mining Company vs. Poka*, 7 Fed. 2d 583, 4 C. J. 960; *American Railroad Company of Porto Rico vs. Santiago, et al.*, 9 Fed. 2d 753.

It is also contended by the Government that the appellant herein did not properly except to the findings which are included in the judgment herein and did not but should have excepted separately to each of said findings in accordance with the proper rules of procedure. It will be borne in mind by the court that this was a non-jury trial and that the court evidently included his findings in the judgment (Tr. 8).

Before closing, the Government also wishes to point out to the court the well settled rule in the State of Washington with reference to a motion for non-suit. In the case of *Jordan vs. Spokane, etc., Ry. Co.*, 109 Wash. 476, we find the rule stated as follows: "This appeal is from a judgment of nonsuit entered at the close of plaintiff's case, and in order to sustain judgment it must appear as a matter of law that there is neither evidence nor reasonable inference therefrom which would have sustained a verdict in defendant's favor. *Godefroy vs. Hunt*, 93 Wash. 371, 160 Pac. 1056; *Fobes Supply Company vs. Kendrick*, 88 Wash. 284, 152 Pac. 1028."

It would seem apparently from the above quotation from the *Jordan* case that the motion for non-suit in the case at bar was properly denied on account of the

fact that it did appear at the time of trial herein that there was evidence or inference therefrom which would have sustained a judgment in plaintiff's favor.

In view of all the foregoing, it is respectfully contended that the judgment of the lower court should be affirmed.

Respectfully submitted

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5497

NATIONAL SURETY COMPANY, a corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Appellant's Reply Brief

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Appellant's Reply Brief

I.

At p. 6 the Government attempts to answer the clear-cut proposition made at p. 11 of the opening brief that "the uncontradicted record and evidence affirmatively show that Burns fully complied with the terms of his bond, and that no default was made."

In the opening brief (pp. 11-13) it was shown that the bail bond covered a violation of the N. P. A. on November 21, 1924. It was further shown that the charge actually brought against Burns was for seven different offenses, commencing with certain offenses on October 24, and running down to November 8, 1924; all of these offenses being separate and distinct offenses. It was further shown that Burns appeared and pleaded guilty to two of the counts in the information, covering crimes alleged to have been committed on October 16 and October 24, 1924, respectively; that at that time the rest of the charges were dismissed, so that on the date on which the forfeiture was alleged to have taken place, to-wit: September 8, 1925, all the charges covered by the bond had been dismissed, and that there was no charge then pending against said Burns, which was covered by the bond.

To meet this situation the Government contends (p. 6) that there was no objection to the introduction of the bail bond in evidence; that, therefore, the variance between the bond and the information was waived.

Obviously this contention is unsound. The bail bond was offered before the information was placed in evidence. At the time the bond was introduced the defendant had a right to assume that the plaintiff in-

tended to later introduce an information which would cover the conditions of the bond, and would show a violation of the conditions of the bond. The objection would not be to the bail bond, but would be to the proof of the information, or the proof of the default. Moreover, the information was not introduced by the Government, but was introduced by the defendant, for the purpose of showing that there was no default at the time the alleged forfeiture took place.

At p. 7 the Government contends that bail bonds are often signed prior to the time that the indictment or information is filed; that it is thus impossible to indict or inform against the defendant on all counts and for all crimes as described in the bond. This, however, is the Government's misfortune and not the surety's. The surety contracted to deliver the defendant to answer a certain charge named in the bond; not to answer any and all charges which the Government may see fit to bring. It must be conceded, of course, that a slight or immaterial variance would not relieve the bond. But in the case at bar the acts and crimes set forth were separate and distinct crimes, complete in themselves, on entirely different days.

Moreover, we do not have here a question of variance, but simply a question of whether or not any information or crime whatsoever was pending against the defendant at the time of the forfeiture which was

covered by the bond. It has been shown that any of the crimes covered by the bond were dismissed long prior to the time that the forfeiture took place.

II.

At p. 8 the Government attempts to meet the point advanced by appellant at p. 13 of the opening brief, that "in any event the bond was discharged because the charge brought against Burns was different than the charge covered by the bond."

In the opening brief (p. 13) it was shown that the bond covered an offense committed on or about November 21; while the charge filed was for seven different, separate and distinct offenses, none of which occurred on November 21, and most of which occurred many days prior to that time. Moreover, these different offenses charged separately occurred on different days. The defendant might be guilty of one or two, but not of all the charges.

The Government contends that the bond was not released because the offenses charged are similar to the offenses charged in the bond. However, this is not true, as the bond and information, when examined, show that they relate to separate and distinct offenses committed at different times, and under different circumstances.

It is further contended by the Government, at p. 9, that the offenses all arise out of the same transaction. This is obviously not not in accordance with the record, for the reason that the offenses are of different grade and character and arose on different days, and are charged separately and distinctly.

III.

The Government again contends at pp. 8 and 9 that the failure to object to the bond waives the point here made. As already pointed out, an objection could not be made to the bond at the time it was introduced for the reason that the defendant had a right to assume that the Government intended to offer in support of its case, an information in accordance with the terms of the bond; or to offer a breach in accordance with the terms of the bond. Until the information and the acts constituting the breach were presented by the Government it would be impossible to say whether or not a fatal variance had occurred. Moreover, as pointed out, the Government at no time introduced in evidence the information. The information was introduced by the defendant to prove that no charge was brought against the defendant which was covered by the bond, and which was still pending when the default occurred.

IV.

The Government contends (p. 9) that the point made by the defendant surety (p. 14 of opening brief) that "the bond was discharged for failure to call the defendant at any proper time" is not well taken for the reason that under the Washington law a "term to term" bond is not required; that the Washington statutes require the bond to be conditioned for appearance at any time.

This statement, however, is contrary to the great number of Federal cases cited at p. 15 of the opening brief.

V.

At p. 12 the Government attempts to meet the point made at p. 16 of appellant's brief that "the bail is discharged under the Washington law."

As shown, the Government contends that the Washington statute applicable to the conditions of the bond, governs in the Federal court. The Government, however, refuses to be bound by the related Washington statutes which require that the information be filed within thirty days after the arrest of the defendant, and that the defendant be brought to trial within sixty days after the information is filed.

It is fair to assume that the broad Washington statutes governing the conditions of the bond would not have been passed had it not been for the similar and related statutes placing a limit of thirty and sixty days respectively upon the power of the prosecutor to hold the defendant on a criminal charge.

The Supreme Court of the State of Washington has construed these statutes to be mandatory, and to require the prosecutor to fully comply with the thirty and sixty day rules. It has further been held by the Supreme Court of the State of Washington, in *State v. Lewis,* 35 Wash. 261, that the benefits of the thirty and sixty day statutes inure to the surety on the defendant's bond; and that the surety may insist upon those provisions for a release of his obligation. Counsel for the Government contends that *State v. Lewis* is not in point because in that case the criminal action was actually dismissed. It will be noted, however, that in *State v. Lewis* the forfeiture of the bond occurred prior to the time the criminal action was dismissed, and, therefore, the *Lewis* case is applicable to the case at bar.

We thus have a situation where the Government attempts to take advantage of the favorable statutes providing for the condition of the bond, but refuses to be bound by the following and related statutes provid-

ing that the prosecution must be had in thirty and sixty days respectively. The Government cannot accept the benefit of one statute, and reject the penalties of the other. It must take the bitter with the sweet.

Hence, the defendant surety was released under the Washington statutes, because in this case there was a failure to file the information within thirty days, and to call the defendant within sixty days.

VI.

At p. 18 of the Government's brief it is contended that the appellant did not properly except to the findings of the court. The assertion of this claim approaches bad faith on the part of the Government. Neither counsel for the Government nor for appellant ever intended the judgment to constitute findings. The judgment was prepared on a stock form by the Government, and an exception taken by the defendant.

Rule 62 of the district court provides that findings may be made under certain conditions. That rule, however, provides that the findings shall be separate and distinct from the judgment; that a request for findings must be made "on or before the submission of the cause for decision." It further provides that the findings shall be made prior to the time that the judgment is "signed and filed;" and further provides that the losing party, not the successful party, shall pre-

pare the findings; that a day shall be set for the settlement of the findings, and notice given to the parties. The record in this case utterly fails to disclose any of these steps, and, in fact, shows that no attempt was made to have findings entered. Moreover, the rule provides that in the event that the losing party fails to present findings, they shall be deemed waived and none shall be made.

It is therefore clear that this point raised by the Government is not only without any merit, but is made without even a pretense of sincerity.

VII.

Counsel for the Government contend (p. 17) that appellant has waived its right to have this court consider the insufficiency of the evidence to support the judgment, for the reason that appellant introduced evidence after its motion for a non-suit was denied and failed to renew its motion at the end of the case. In support of this contention are cited four cases:

American R. R. Co. of Porto Rico v. Santiego, 9 Fed. (2nd) 753;

Bunker Hill Mining etc. Co. v. Polak, 7 Fed. (2nd) 583;

Columbia and Puget Sound R. R. Co. v. Hawthorne, 144 U. S. 202;

Gilson v. F. S. Royster Guano Co., 1 Fed. (2nd) 82.

We admit that the general rule announced in these cases is applicable under certain circumstances. But we most urgently call the court's attention to the fact that this general rule is not an absolute and arbitrary one. It is subject to exception; and the case presented in this appeal falls clearly within all of these exceptions.

It might be well first to consider the reason for the general rule. The principles underlying it are aptly stated in *Lancaster v. Foster,* 260 Fed. 5, at p. 6, as follows:

> "In behalf of the defendants in error it is contended that the first mentioned exception can not be availed of by the plaintiff in error because the latter thereafter introduced other evidence. A number of decisions are cited which indicate the existence of a rule to that effect. There is obviously good reason to support such a rule, where the record does not disclose the subsequently introduced evidence, or where that evidence is disclosed and it is such as to make the evidence as a whole enough to justify its submission to the jury. If the subsequently introduced evidence is not disclosed to the appellate court, it may be presumed that the plaintiff's case was strengthened by it, and that the evidence as a whole was such that an instruction to find for the defendant could not properly have been given. If any deficiency in the evidence offered by plaintiff is shown, or is to be presumed to have been supplied by the evidence offered by the defendant, the latter is in no position to complain of the court's refusal to direct a verdict in its favor. Such a position was presented in the case of *Grand*

Trunk R. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 66. The bill of exceptions in that case did not show the evidence introduced by the defendant after the overruling of its motion, that a verdict in its favor be directed. It was held that under such circumstances it must be presumed that when the case was closed on both sides there was enough testimony to make it proper to leave the issues to be settled by the jury. There is no room for such a presumption where all the evidence adduced on both sides is contained in the bill of exceptions, and neither the part of it which was before the court when it refused to direct a verdict for the defendant, nor all the evidence on both sides was enough to make it proper to leave the issues to be settled by the jury.

"The evidence introduced by the defendants in the instant case had no tendency to support the claim asserted by the plaintiff, or to supply any deficiency in the evidence offered by the latter. If it was error to overrule the motion for a directed verdict when it was first made, nothing afterwards occurred to cure that error. * * * * We do not think the rule invoked is applicable where it is affirmatively made to appear that there is an absence of any good reason for applying it."

It will be readily seen that a general rule based upon such a theory must necessarily have exceptions, and cannot be arbitrarily exercised in every case. The court has so decided. In fact, this court, in the case of *Alaska Fishermen's Packing Co. v. Chin Quong,* 202 Fed. 710, recognizes such an exception. In holding that in the particular case before the court the failure to renew was fatal, Judge Gilbert said, at p. 710:

"Error is assigned to the denial of the defendant's motion for a non-suit as to the first cause of action made at the close of the plaintiff's testimony. The assignment of error is of no avail to the defendant in this court, for the reason that, after the motion for a non-suit was overruled, the defendant proceeded to take testimony upon the issues involved in said cause of action, including evidence tending to show that plaintiff had not performed the contract, and did not, at the close of all the testimony, request the court to instruct the jury to return a verdict in its favor. *The case is unlike Lydia Cotton Mills v. Prairie Cotton Co.,* 156 Fed. 225, 84 CCA. 129, in which the court held that error might be assigned to the overruling of a motion for a non-suit made at the close of plaintiff's evidence, on the ground that there was no issue of fact for submission to the jury, notwithstanding that the defendant thereafter took testimony, and did not renew the motion at the conclusion of all the evidence. *In that case the motion was based solely upon a proposition of law, and no issue or question of fact was involved, and the defendant's evidence had, and could have, no bearing upon it.*"

It is appellant's contention that this appeal comes squarely within this exception. Here there was no controverted question of fact for submission to a jury; there was nothing but a cold proposition of law, presented to the court. Furthermore, the defendant's evidence had, and could have, no bearing upon plaintiff's case. The complete record is before this court on review, from which it is clearly apparent that the evidence introduced by appellant could in no conceiv-

able way bolster up plaintiff's case, the weakness of which remained precisely as it was before defendant's evidence was put in. No possible interpretation can be placed upon the record to warrant a finding that defendant at any time waived its motion for a non-suit. Under these circumstances, then, the general rule does not apply.

A case directly in point on the contention we are making is *Citizens Trust & Savings Bank v. Falligan,* 4 Fed. (2nd) 481, heard in this court on April 6, 1925. Judge Gilbert, in accordance with his comment on the *Alaska Fisherman's* case, *supra,* discusses our point as follows:

> "The bank assigned error to the denial of its motion for a non-suit made at the close of the plaintiff's testimony. The ground of the motion was that there was no evidence to show that the bank participated in, or was a party to, the fraud. *The defendant in error contends that the bank waived its motion by its failure to request a peremptory instruction in its favor at the close of all the testimony. After the denial of the bank's motion, Barry testified in his own behalf; but the bank offered no further testimony and stood upon its motion.* The defendant in error cites cases holding that a motion for non-suit is waived where not renewed in a case where testimony is thereafter taken by the party so moving. In *Columbia Railroad Co. v. Hawthorne,* 144 U. S. 202, it was held that the refusal to direct a verdict for the defendant at the close of the plaintiff's evidence, when the defendant has not rested his case can

not be assigned as error. *It is true that the defendant bank in the present case at no time formally announced that it rested. But that circumstance is deemed of no importance. The controlling fact is that it did not waive its motion. Kinnear Mfg. Co. v. Carlisle,* 152 Fed. 933.

"The question, therefore, is properly before us, whether or not there was evidence to go to the jury on the question of the bank's complicity in the fraud which was practiced upon the plaintiff."

It is to be noted that this opinion was in a case tried to a jury. The case at bar presents a much stronger exception. Here was a clear proposition of law with no controverted question of fact, triable to the court, and the evidence defendant put in could in no wise affect plaintiff's case.

Another case squarely in point is *Lydia Cotton Mills v. Prairie Cotton Co.,* 156 Fed. 225. It is there stated, beginning at p. 233:

"The testimony of the witnesses offered by the defendant in the case now under consideration in no way affects that offered by the plaintiff * * * *. We do not think that the rule of practice laid down in *Grand Trunk Ry. Co. v. Cummings,* and in *Insurance Co. v. Crandall,* above cited, applies in the case before us. The principle in our case is that there was no issue of fact for the jury at all, upon any of the evidence, or upon all of the evidence. The question was one solely for the court—the construction of a written contract, plain in its terms * * * *. The construction of the contract as set forth above in this opinion be-

> ing for the court, there was no issue of fact for the jury. In all of the cases we have examined on the point we are now discussing, there was some evidence relating to the fact at issue, and the rule was laid down that if the defendant failed, after introducing testimony, to renew the motion to direct a verdict made at the close of plaintiff's case, the refusal of the trial court to grant the motion could not be assigned as error * * * *.
>
> "The motion of defendant was based solely upon a proposition of law, and no issue or question of fact was involved. We do not think, therefore, that any question in regard to the rule of practice referred to arises."

It is noted that in this case, as in the case at bar, "there was no issue of fact involved upon any of the evidence or upon all of the evidence. The question was one solely for the court—the construction of a written contract plain in its terms." It is to be noted further that this very case is the one referred to by Judge Gilbert in his opinion in the *Alaska Fishermen's* case, *supra,* as being an exception to the general rule.

The latest case in point is that of *American State Bank v. Mueller Grain Co.,* 15 Fed. (2nd) 899, in which it is said:

> "There was a motion for a directed verdict at the close of plaintiff's evidence. That, if not waived by subsequently calling the witness Stein-

ert for the defendant, is available here. We are of opinion that it was not waived * * * *.

"In *Grand Trunk Ry. Co. v. Cummings,* 106 U. S. 700, speaking of a motion made by defendant at the close of plaintiff's testimony, the court said: 'If he goes on with his defense and puts in testimony of his own, and the jury, under proper instructions, finds against him on the whole evidence, the judgment cannot be reversed, *in the absence of the defendant's testimony* on account of the original refusal, even though it would not have been wrong to give the instruction at the time it was asked.'

"In *Lydia Cotton Mills v. Prairie Cotton Co.,* 156 Fed. 225, the court said: 'The reason for the principle laid down in the case last cited (*Grand Trunk*) is readily apparent, that, although the testimony offered by plaintiff may not in itself have been sufficient to warrant a verdict, yet the court was entitled to see what effect the testimony of defendant subsequently offered may have had upon the issues involved. For, it frequently occurs in the trial of causes that the testimony of the defendant upon cross examination of witnesses, or disclosures otherwise made, has a tendency to strengthen rather than weaken plaintiff's case. It was, therefore, important that the defendant's testimony should be set out in the record, that the court might see and determine upon all of the testimony, as to whether or not the case should have gone to the jury.'

"The court held that the defendant might have assigned for error the overruling of a motion to dismiss, made at the close of plaintiff's evidence under the circumstances there shown. In *Lancaster v. Foster,* 260 Fed. 5, the court held that an

> exception to denial of the motion for a requested verdict made at the close of plaintiff's case, is not waived by defendant by subsequent introduction of evidence, where such evidence is all in the record, and contains nothing which strengthens plaintiff's case. Petition for certiorari was denied in that case."

These cases, and not the cases in appellee's brief, set forth the law applicable on this appeal. Each of the cases cited by counsel for the Government applies the general rule to a case falling within the scope of that rule—a case where there is an issue of fact, and not solely a proposition of law—a case where the defendant's evidence was not before the court on appeal —or a case where the evidence offered by defendant affected plaintiff's case. Such cases are no authority for the case at bar.

We submit that defendant's motion for a non-suit was not waived; that there was no issuable question of fact involved; that the sole question was one of law; that with or without defendant's evidence it remained the same; that the question of the sufficiency of the evidence to sustain the judgment entered below is properly reviewable by this Honorable Court.

In conclusion it is respectfully submitted that the judgment should be reversed for the reason that there was no proof whatsoever that the surety was called; no proof of the judgment *nisi;* the uncontradicted evi-

dence affirmatively shows that the defendant fully complied with the terms of the bond, and that no default was made; that the only part of the seven charges brought against the defendant, which were by any chance covered by the bond, were dismissed prior to the alleged forfeiture; that the bond was discharged because the seven charges brought against the defendant were more and different than the charge covered by the bond; that the bond was discharged for failure to call the defendant within the time specified, and for failure to file a charge during the term specified in the bond; that the defendant's surety was released on failure of the Government to justify an indefinite continuance of the case from May 26, after a plea of guilty, to September 8, thereby unjustly prolonging the risk of the surety.

Respectfully submitted,

CALDWELL & LYCETTE,

Attorneys for Appellant.

No. 5498

United States

Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL SURETY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court, Western District of Washington, Northern Division.

No. 11,026.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EUGENE RODGERS,
Defendant.

WRIT OF SCIRE FACIAS.

President of the United States of America, to the Marshal of the Western District of Washington:

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*Page-number appearing at the foot of page of original certified Transcript of Record.

WHEREAS, heretofore, to wit, on the 24th day of February, 1925, a recognizance and surety bond in the sum of Seven Hundred Fifty Dollars ($750.00) was executed by the defendant Eugene Rodgers, as principal, and the National Surety Company, as surety, which said recognizance and surety bond was conditioned for the appearance of the said defendant Eugene Rodgers before the United States District Court for the Western District of Washington, Northern Division, at the courthouse in the city of Seattle, during the May, 1926, term of said District Court, and from time to time, and term to term, thereafter, to answer a charge of the United States of America exhibited against the said defendant, and not to depart out of the jurisdiction of the court without leave; and that thereafter, on the 28th day of February, 1925, the said recognizance for appearance before the said District Court, and surety bond was filed in said court with the Clerk thereof.

AND, WHEREAS, thereafter, to wit, on the 3d day of January, 1927, and at a proper term of said court, the said defendant Eugene Rodgers being called to come into court [2] and to answer said charge, came not, but made default, whereupon, on motion of United States District Attorney, it was considered by the Court that for the default aforesaid, the said defendant Eugene Rodgers as principal, and the National Surety Company as surety, forfeit and pay to the United States of America the sum of Seven Hundred Fifty Dollars ($750.00) according to the tenor and effect of said recognizance and surety bond now

in the hands of the Clerk of said court, unless they appear at the next term of said court, and show sufficient cause to the contrary.

YOU ARE, THEREFORE, HEREBY COMMANDED, to make known the contents of this writ to the said defendant Eugene Rodgers and the National Surety Company, and summon them to appear before said District Court of the United States, at a court to be held before the Western District of Washington, Northern Division, at the courthouse in Seattle, on the 4th day of April, 1927, and to show cause, if any they have, why judgment *nisi* aforesaid should not be made absolute, and further, to show cause why they ought not to have execution issue against them for the respective amounts due to the United States of America, upon said surety bond, under the judgment aforesaid, together with any costs which may accrue by reason of proceedings to be had in the enforcement of said judgment, as by law provided.

HEREIN FAIL NOT.

WITNESS, the Hon. JEREMIAH NETERER, Judge of the United States District Court, at Seattle, in said District, on the 8 day of March, 1927.

[Seal] ED. M. LAKIN,

Clerk of the District Court of the United States for the Western District of Washington.

By T. W. Egger,

Deputy Clerk, U. S. District Court, Western District of Washington. [3]

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed *scire facias* on the therein named National Surety Co., by handing to and leaving a true and correct copy thereof with Mr. W. H. Brinker, Agent, personally, at Seattle, in said District, on the 9th day of March, A. D. 1927.

E. B. BENN,
U. S. Marshal.
By J. E. Williams,
Deputy.

Western District of Washington,—ss.

I hereby certify and return, that on the 9th day of Mch., 1927, I received the within writ and that after diligent search, I am unable to find the within named defendant Eugene Rogers within my district.

E. B. BENN,
United States Marshal.
By J. E. Williams,
Deputy United States Marshal.

[Endorsed]: Filed Mar. 10, 1927. [4]

[Title of Court and Cause.]

AMENDED RETURN TO WRIT OF SCIRE FACIAS.

Comes now the National Surety Company, and making answer and return to the writ of scire

facias heretofore issued herein, and served upon the National Surety Company, admits, denies and alleges as follows, to wit:

I.

This defendant admits that on the 24th day of February, 1925, a surety bond was executed in the sum of $750.00 with Eugene Rogers as principal and the National Surety Company as surety; but denies that said bond was conditioned for the appearance of said defendant, Eugene Rogers, before the United States District Court for the Western District of Washington, during the May, 1926, term of said District Court, or any other time or times; and this defendant, National Surety Company, further denies each and every other allegation in said writ contained.

For further return and answer to said writ of scire facias, and as a first affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That the defendant, Eugene Rogers, complied with each and every term and condition of said bond so executed by him and the National Surety Company, on the 24th day of February, 1925; and that by having complied with the terms of said bond, the same [5] was and is terminated, and there is no liability whatsoever on the National Surety Company or said defendant Eugene Rogers.

For further return and answer to said writ of scire facias, and as a second affirmative defense

thereto, National Surety Company alleges as follows, to wit:

I.

That the bond of the National Surety Company, executed on the 24th day of February, 1925, was a bond given before United States Commissioner R. W. McClellan, and required the appearance of the defendant Eugene Rogers before said Commissioner; that thereafter said Eugene Rogers appeared before said United States Commissioner as required by the terms of said bond, and said Commissioner duly and regularly bound said defendant, Eugene Rogers, over to answer an information to be filed in the United States District Court for the Western District of Washington, Northern Division, and required said defendant Eugene Rogers to file another and final bond; that thereupon, to wit, on the 27th day of February, 1925, said defendant Eugene Rogers did execute a further surety bond in the sum of $1,500.00, conditioned for the appearance of said defendant Eugene Rogers before the United States District Court for the Western District of Washington, and said bond was thereafter filed in the United States District Court in the above-entitled action, and this defendant was released upon said bond; that by reason of the aforesaid facts the said bond of February 24th, was and is null and void and all liability thereon terminated.

II.

The said final bond so executed by said defendant and filed in the above-entitled action, was not

conditioned for the appearance of said defendant Eugene Rogers before the United States District Court for the Western District of Washington, [6] Northern Division, "during the May, 1926, term of said District Court and from time to time and term to term thereafter," as set forth in the writ of scire facias heretofore issued herein; that said Eugene Rogers was not thereafter, to wit, on the 3d day of January, 1927, at a proper term of said court, called to come into court and answer the charge brought against him, nor was said defendant ever called at any proper term of said court under said bond, nor did said defendant make default at any time under said bond.

For further return and answer to said writ of scire facias, and as a third affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That the bond filed in this cause is null and void and of no effect whatsoever, for the reason that the condition of the bond, as it appears upon the face thereof, was that the said defendant, Eugene Rogers, should appear and answer as follows: "on the —— day of ———— term, to be begun and held in the City of Seattle in said District on the —— day of the present term 1925, and from time to time and term to term thereafter"; that said bond is void for the reason that no definite date is set for the appearance of said defendant.

For further return and answer to said writ of scire facias, and as a fourth affirmative defense

thereto, National Surety Company alleges as follows, to wit:

I.

That said bond was executed on the 27th day of February, 1925; that said bond is, on its face, conditioned for the appearance of the defendant on the —— date of the ———— term to be begun and held at the City of Seattle in said district on the —— day of the present term, 1925, and from time to time and term to term thereafter, to which the case may be continued; [7] that said Eugene Rogers was not called to appear during said "present term," nor at any time during said "present term," nor was said defendant, Eugene Rogers, called during the following term or at any term during 1925, nor at any term during 1926, nor at any time until the 3d day of January, 1927, as set forth in said writ of scire facias herein; that by reason of said facts said Eugene Rogers did not violate the conditions of his said bond, and said defendant was never called at any proper term of said court.

For further return and answer to said writ of scire facias, and as a fifth affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That at the time said bond was executed by the National Surety Company, said bond provided for the appearance of said defendant on the —— date 1925 and from time to time thereafter; that after the delivery of said bond, and without the knowl-

edge or consent of the National Surety Company, said bond was materially altered and changed by the addition therein of the words "present term," and by the addition of the words "term to term"; that the said National Surety Company is informed and believes that said additions were made in ink thereon, after the delivery of said bond, by R. W. McClelland the United States Commissioner, to whom the said bond was offered for approval; that said changes were made without the authority or approval of the National Surety Company; that said alterations and changes increase and enlarge the liability of the National Surety Company and are material alterations; that by reason of said changes and alterations, material in character, the liability of the National Surety Company on said bond was and is terminated, and said bond became null and void. [8]

For further return and answer to said writ of scire facias, and as a sixth affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That said bond so filed in this cause was and is null and void by reason of the following facts, to wit: that said bond, on its face, provides as follows: That said defendant is required "then and there to answer the charge of having on or about the —— day of ———— A. D. 192—, within said district, in violation of section —— of the ———— (Act of ——) (Criminal Code) (R. S.) of the United States, unlawfully violating the National

Prohibition Act"; that by the terms of said bond this defendant, Eugene Rogers, was not bound to answer any charge of whatsoever kind or nature under the laws of the United States; that by reason of the failure of said bond to provide for the defendant's answering for a definite and known or specific charge under the laws of the United States, said bond was and is null and void and there is no liability whatsoever on the surety, the National Surety Company; that by reason of the foregoing facts said Eugene Rogers was not called to answer any charge and there being no charge mentioned in said bond, said Eugene Rogers did not violate the condition of said bond.

For further return and answer to said writ of scire facias, and as a seventh affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That if the condition of said bond was that the defendant answer to any charge whatsoever against him, then he was only bound by said bond to answer a single charge; that instead of filing a single charge against said defendant, the said plaintiff, United States of America, on the 30th day of September, 1926, filed an information against said defendant in the above-entitled [9] action, in two counts, charging the said defendant with two violations of the National Prohibition Act, to wit, on the first count, unlawfully possessing intoxicating liquors on the 21st day of February, 1925, and on the second count, unlawfully maintaining a com-

mon nuisance by manufacturing and selling intoxicating liquors on February 21st, 1925, at the premises known as 101½ Occidental Avenue, Seattle; that by reason of the plaintiff's having filed more than one charge against the defendant in the above-entitled action and under said bond, the risk of the surety was greatly increased; that by reason of said facts the liability of said surety was and is terminated, and said surety was and is released.

For further return and answer to said writ of scire facias, and as an eighth affirmative defense thereto, National Surety Company alleges as follows, to wit:

I.

That no notice of whatsoever kind or nature was given to the National Surety Company to produce said defendant, prior to the date of forfeiture herein; that said forfeiture was and is premature and improper, in that said action was set for trial on February 8, 1927, and thereafter continued to March 8, 1927, and thereafter continued to March 15th, 1927, all of which dates are subsequent to the date of the alleged forfeiture of said bond.

WHEREFORE, having made its return to the writ of scire facias issued herein, and having fully answered the same, and having shown cause why the judgment *nisi* aforesaid should not be made absolute and why execution should not issue against the National Surety Company for the amount claimed in said writ of scire facias, the National Surety Company prays that judgment absolute be not rendered against it, and that it be relieved from

any and all liability under said bond, and from any and all costs [10] accruing thereunder and that said writ of scire facias be discharged.

CALDWELL & LYCETTE.
CALDWELL & LYCETTE,
Attorneys for National Surety Company.

United States of America,
Western District of Washington,
Northern Division,—ss.

Hugh M. Caldwell, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the National Surety Company, a corporation, and makes this verification for and on behalf of said National Surety Company for the reason that it is a foreign corporation and that there is no officer thereof within the State of Washington upon whom service of process may be had; that he has read the foregoing return to writ of scire facias, knows the contents thereof and believes the same to be true.

HUGH M. CALDWELL.

Subscribed and sworn to before me this 7th day of April, 1927.

JOHN P. LYCETTE,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: This pleading should have been filed on May 10, 1927.

[Endorsed]: Filed May 15, 1928. [11]

[Title of Court and Cause.]

WAIVER OF JURY.

Comes now the National Surety Company, and waives any right it might have to a jury trial herein.

NATIONAL SURETY COMPANY,
By CALDWELL & LYCETTE,
Its Attys.

O. K.—PAUL D. COLES,
Asst. District Attorney.

[Endorsed]: Filed Jun. 13, 1927. [12]

United States District Court, Western District of Washington, Northern Division.

No. 11,028.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EUGENE RODGERS,
Defendant.

JUDGMENT.

It appearing to the Court from the records and files herein and from the evidence adduced that on the 3d day of January, 1927, the above-named defendant Eugene Rodgers was duly called into this court to answer to the information heretofore filed against him charging him with violation of Sec-

tions 3 and 21, Title II, National Prohibition Act, and that when so called the said defendant Eugene Rodgers defaulted and failed to appear, and that he was duly and regularly summoned from the door of said courtroom three times to appear and answer to said information and again failed to appear; and that thereafter, on, to wit, the 3d day of January, 1927, the recognizance and surety bond which was executed by the said defendant Eugene Rodgers in the sum of $750.00, which said recognizance and surety bond was conditioned for the appearance of the said defendant Eugene Rodgers before the United States District Court for the Western District of Washington, Northern Division, at the courthouse in the City of Seattle, at the next term, to wit, May, 1926, term of said District Court, and from time to time and from term to term thereafter, was upon motion of the United States Attorney duly forfeited and judgment *nisi* thereupon entered defaulting said recognizance and sureties upon said surety bond.

That thereafter, on the 8th day of March, 1927, a writ of scire facias was duly issued out of this court commanding [13] the said Eugene Rodgers, as principal, and the National Surety Company, as surety, to appear before this Court on the 4th day of April, 1927, to show cause why said judgment *nisi* should not be made absolute, and further, to show cause why they ought not to have execution issue against them, and each of them, for the amount due to the United States of America upon said surety bond under the judgment as afore-

said, together with any costs which may accrue by reason of proceedings to be had in the enforcement of said judgment as by law provided, and that the said defendant Eugene Rodgers could not be found, and that service was effected on said National Surety Company, as surety, and that the said writ has been duly returned into this court by the United States Marshal for said district with his return thereon as aforesaid; and an answer to said writ was regularly filed by the Surety Company, and on May 10, 1927, the matter was regularly brought on for hearing before the undersigned, one of the Judges of the above-entitled court for the Western District of Washington, the United States appearing by Thomas P. Revelle, United States Attorney, and Paul D. Coles, Assistant United States Attorney, and the National Surety Company appearing by Caldwell & Lycette, its attorneys; and the Court being fully advised in the premises, it is by the Court—

ORDERED AND ADJUDGED that the said judgment *nisi* entered herein on the 3d day of January, 1927, forfeiting said recognizance and declaring that said defendant Eugene Rodgers as principal, and National Surety Company, as surety, forfeit and pay to the United States of America the sum of Seven Hundred Fifty ($750.00) Dollars, according to the tenor and effect of said recognizance and surety bond, be made absolute; and it is further

ORDERED that the Clerk of the above court be, and he hereby is, authorized and directed to issue writ of execution against the property of National

Surety Company, surety upon said surety bond, for the sum of Seven Hundred Fifty ($750.00) Dollars, [14] together with all costs which may accrue by reason of proceedings to be had in the enforcement of said judgment, as by law provided.

Done in open court this 2d day of April, 1928.

EDWARD E. CUSHMAN,
United States District Judge.

The defendant National Surety Company excepts to each and every part of the foregoing judgment, and *tis* exceptions are hereby allowed this 2d day of April, 1928.

EDWARD E. CUSHMAN.

[Endorsed]: Filed Apr. 2, 1928. [15]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the UNITED STATES OF AMERICA, Plaintiff, and to THOS. P. REVELLE, United States Attorney, and PAUL D. COLES and DAVID L. SPALDING, Assistant United States Attorneys, Its Attorneys:

You, and each of you, will please take notice that the defendant, National Surety Company, in the above-entitled cause, has appealed, and does hereby appeal, to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain judgment entered in the above-entitled court and cause on the 2d day of April, *192* , and from the whole and every part thereof.

Dated this 23d day of April, 1928.

CALDWELL & LYCETTE,
Attorneys for National Surety Company.

Copy received this 1st day of May, 1928.

D. SPAULDING,
United States Attorney.

[Endorsed]: Filed May 1, 1928. [16]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Now comes the defendant, National Surety Company, and files the following assignments of error upon which it will rely on its prosecution of the appeal in the above-entitled cause from the decree made by this Honorable Court on the 2d day of April, 1927.

JUDGMENT.

1. That the United States District Court for the Western District of Washington, Northern Division, erred in refusing to grant the appellant and defendant's motion for a nonsuit.

2. That said Court erred in granting judgment for the plaintiff and respondent.

3. That said Court erred in refusing to grant judgment for the defendant and appellant, dismissing the cause.

WHEREFORE, appellant prays that said judgment be reversed, and that the United States District Court for the Western District of Washington,

Northern Division, be ordered to enter a judgment and order reversing said decision in said cause.

CALDWELL & LYCETTE,

Attorneys for Defendant, National Surety Company.

[Endorsed]: Filed May 1, 1928. [17, 18]

[Title of Court and Cause.]

SUPERSEDEAS AND COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, the National Surety Company, a corporation, appellant herein, as principal, and the New York Indemnity Company, a corporation organized under the laws of the State of New York, authorized to transact the business of surety in the State of Washington, and in the District of Washington, as surety, are held and firmly bound unto the United States of America, plaintiff herein, in the full and just sum of Fifteen Hundred ($1500.00) Dollars, well and truly to be paid, we bind ourselves and our and each of our, heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 23d day of April, 1928.

The condition of this obligation is such, that,

WHEREAS, the above-named plaintiff, United States of America, on the 2d day of April, 1928, in the above-entitled court and action, recovered

judgment against the defendant above named in the sum of Seven Hundred Fifty ($750.00) Dollars; and

WHEREAS, the above-named principal, National Surety Company, a corporation, has heretofore given due and proper notice that it appeals from said decision and judgment of said District Court, to the United States Circuit Court of Appeals for the Ninth [19] Circuit;

Now, therefore, if the said principal, the National Surety Company, a corporation, shall pay to said plaintiff and respondent, the United States of America, all costs and damages that may be awarded against said National Surety Company, a corporation, on said appeal, and shall prosecute its said appeal to effect, and answer all costs if it fail to make good its plea, and shall satisfy and perform the judgment and order appealed from, in case it shall be affirmed, and shall satisfy and perform any judgment or order which the said United States Circuit Court of Appeals for the Ninth Circuit may render or make, or order to be rendered or made by said United States District Court for the Western District of Washington, Northern Division, then this obligation to be void; otherwise to remain in full force and effect.

NATIONAL SURETY COMPANY.

[Seal] By JOHN P. LYCETTE,
Its Atty.

NEW YORK INDEMNITY COMPANY.

[Seal] By J. GRANT,
Its Attorney-in-Fact.

The above supersedeas and cost bond on appeal is hereby approved as to form and amount, the Asst. U. S. Atty. having O. K.'ed the same.

EDWARD E. CUSHMAN,
United States District Judge.

O. K.–D. SPAULDING,
Asst. U. S. Attorney.

[Endorsed]: Filed May 1, 1928. [20]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING JUNE 11, 1927, TO FILE BILL OF EXCEPTIONS.

This matter having come on regularly for hearing on the motion of the National Surety Company for an order extending the time for filing a bill of exceptions in the above-entitled matter, until Saturday, June 11th; and it appearing that there is no objection thereto,

NOW, THEREFORE, IT IS HEREBY ORDERED that the time for filing a proposed bill of exceptions in this cause be, and the same is hereby, extended to and including Saturday, June 11th, 1927.

Done in open court this 9th day of June, 1927.

EDWARD E. CUSHMAN.

O. K.—PAUL D. COLES,
Asst. U. S. Attorney.

[Endorsed]: Filed Jun. 9, 1927. [21]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that heretofore, to wit, on the 10th day of May, 1927, this cause came on regularly for trial before the Honorable E. E. Cushman, one of the Judges of the above court, sitting without a jury; the plaintiff appearing by Thos. P. Revelle and Arthur E. Simon, its attorneys, and the National Surety Company appearing by Hugh M. Caldwell and John P. Lycette, its attorneys, and the defendant Eugene Rodgers not appearing.

Thereupon the following proceedings were had and testimony taken, to wit:

It was stipulated that as the case was triable by a jury, the National Surety Company would have permission to file a written waiver of jury as soon as the case was finished, it being considered that such written waiver was filed prior to the time the case was heard.

Mr. Simon offered in evidence the bond in the above case, to which an objection was made that it was not the bond on which the writ of scire facias was brought, the writ being brought on the bond executed on the 24th of February, 1925. Thereupon the Government moved to amend the motion for writ of scire facias and the writ of scire facias, changing the date alleged from the 24th to the 27th day of February, 1925, to which an objection was made [22] on the ground that the writ referred

to the bond executed on the 24th and not the 27th, and on the further ground that the bond of February 24th mentioned in the writ is on file and that the answer filed to that bond had not been controverted and nothing done. Mr. Simon explained that the bond dated February 24th was a commissioner's bond, and through clerical error the date of that bond was taken rather than the date of the final bond. The Court thereupon overruled the objection and permitted the amendment to be made, stating: "Now, if there is no further amendment of the writ asked—" to which Mr. Simon stated: "No further amendment is asked."

Mr. LYCETTE.—Allow us an exception.

The COURT.—Exception is allowed.

The Court thereupon granted the defendant the right to file an amended answer, and an amended answer was filed. Thereupon the Government offered the bond in evidence as Plaintiff's Exhibit 1, to which an objection was made on the ground that it was not the bond mentioned in the writ; objection was overruled, and the bond received as Exhibit 1.

It was admitted that the National Surety Company executed this bond, and that it was filed February 28, 1925, with the Clerk. Thereupon the Government read into the record Clerk's docket in cause No. 11028 as follows: "Line one, September 30, 1926, filed information; Line two, January 3, 1927, enter order forfeiting bail and for bench warrant." Thereupon the Government rested. Thereupon the defendant moved for a nonsuit on

(Testimony of John P. Lycette.)

the ground that the Government's case showed affirmatively that there was no cause of action, and also showed affirmatively that there was a good defense to the action. The motion was denied.

Thereupon the National Surety Company offered in evidence lines 2, 3, and 4 of the Clerk's docket, line 4 being "January 3, 1927, enter order for trial February 8th, 1927." Lines [23] 3 and 4 were admitted in evidence. Line 7, reading "February 8, 1927, entered order trial March 8, 1927"; line 11, reading "March 9, 1927, entered order trial March 15th at foot of calendar"; line 14, reading "March 15, 1927, entered order, cause over term," were all admitted in evidence.

It was stipulated that the entry that the defendant was called on the 3d day of January, 1927, is the only time he was called, if at all.

TESTIMONY OF JOHN P. LYCETTE, FOR DEFENDANT.

JOHN P. LYCETTE, sworn as a witness for the defendant, testified: My name is John P. Lycette. I am one of the attorneys for the National Surety Company and handled the bail bond forfeitures. That preparatory to filing a return in this action I investigated the records of the National Surety Company, at the office, and found that the bond issued by the National Surety Company originally did not have the written words "Present term" or "term to term." That so far as the office which executed the bond is concerned, no authority was

(Testimony of John P. Lycette.)

given to put in these words. That the words appear to be in the handwriting of the United States Commissioner; that my judgment is formed by what appears in the commissioner's handwriting on the instrument; that I am not familiar with the commissioner's handwriting other than his name on the bond; that said words were not on the bond when it left the office, nor were they put on with our consent; that our company keeps copies of most of the bonds; the bonds are set up in the home office; they have a form which shows the condition of the bond, the dates, and so on, on the face of it, a sort of skeleton affair. I examined the girl in the office where the bond was written, and whatever records she had, to determine that the words were not on the bond, but I cannot remember the exact records I looked at. That was some time ago.

On cross-examination the witness testified that when [24] the bond left the office it was blank, in the spaces had been filled in the words "present term"; that the bonds as written have no place to add the words "term to term"; an original bond issued by the National Surety Company with the words printed in "term to term," and when they desired to use a bond of that nature they used the printed form containing the words "term to term." I do not know whether the alteration was made prior to the filing of the bond with the commissioner, or not, except that it was made after it left the defendant's office. I do not know the exact date the words were put in except as I have testi-

(Testimony of John P. Lycette.)
fied—that is, when the bond left the office it contained a blank space, in which now are written the words 'term to term.''

Witness excused.

Thereupon the information filed in the case was offered in evidence as Defendant's Exhibit "A–2." The defendant thereupon rested, and the Government had no rebuttal. Thereupon an extended argument was had, at the end of which the Court rendered judgment for the plaintiff and made the forfeiture absolute. An exception was allowed to this ruling.

This bill of exceptions contains in substance all the testimony offered in this case. The National Surety Company prays that this, its bill of exceptions, be allowed, settled and signed.

CALDWELL & LYCETTE,
Attorneys for National Surety Company.

Settled and allowed this 11th day of July, 1927.

EDWARD E. CUSHMAN,
District Judge.

Copy of bill of exceptions received this 11th day of June, 1927.

THOS. P. REVELLE.

[Endorsed]: Lodged Jun. 11, 1927.

[Endorsed]: Filed Jul. 14, 1927. [25]

No. 11,028.

GOVERNMENT'S EXHIBIT No. 1—ADMITTED.

FINAL RECOGNIZANCE OF DEFENDANT.

United States of America,
Western District of Washington,
Northern Division,—ss.

BE IT REMEMBERED, that on this 27 day of February, A. D. 1925, before me, a United States Commissioner for the said Western District of Washington, Northern Division, personally came Eugene Rogers, principal, and National Surety Company, sureties, and jointly and severally acknowledged themselves to owe the United States of America the sum of Seven Hundred Fifty and no/100 Dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

THE CONDITION of this recognizance is such, that if the said Eugene Rogers, principal, shall personally appear before the District Court of the United States in and for the Western District of Washington, on the —— day of the ———— term, to be begun and held at the City of Seattle, in said District, on the —— day of present term 1925, and from time to time, thereafter to which the case may
term to term
be continued and then and there answer the charge of having, on or about the —— day of ————, A. D. 192—, within said District, in violation of

Section ——— of the ——— (Act of ———) (Criminal Code) (Revised Statutes) of the United States, unlawfully violating the National Prohibition Act, and then and there abide the judgment of said Court, and not depart without leave thereof, then this recognizance to be void, otherwise to remain in full force and virtue.

[Seal] EUGENE ROGERS. [Seal]
Principal.
NATIONAL SURETY COMPANY. [Seal]
By C. B. WHITE, [Seal]
Attorney-in-fact.

Taken and acknowledged before me on the day and year first above written.

[Seal] ROBT. W. McCLELLAND,
United States Commissioner as Aforesaid. [26]

[Endorsed]: Part of Commissioner's Transcript. Court No. 3000. Filed Feb. 28, 1925. [27]

EDWARD E. CUSHMAN,
United States District Court.

68
11028.

Title of Case.	Attorneys.
THE UNITED STATES vs. EUGENE RODGERS.	For U. S.: For Defendant:

Violation of National Prohibition Act.

* * * * * * * * * * *

Date			PROCEEDINGS.		
Month.	Day.	Year.			Line
Sept.	30	1926.	Filed Information	Govt. Ex. 2)	1
Jan.	3	1927.	Ent. Order forfeiting bail and for bench warrant.	") Adm.	2
"	3	"	Issued bench warrant. Bail $1500.00.	Deft. A-1 adm.	3
Jan.	3	"	Ent. order for trial Feb. 8, 1927.	A-1 "	4
Feb.	8	"	Ent. order trial over to March 8, /27.	A-1 adm.	7
Mar.	9	"	Ent. order trial over March 15, at foot of Calendar.	A-1 adm.	11
"	15	"	Ent. order cause over term.	A-1 adm.	14

[28]

DEFENDANT'S EXHIBIT "A-2" — ADMITTED.

(Wash. No. 2625.)

(Commr's No. 3000—Bail $750.)

United States District Court, Western District of Washington, Northern Division.

May, 1926, Term.

No. 11,028.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EUGENE RODGERS,

Defendant.

INFORMATION.

BE IT REMEMBERED, that Thos. P. Revelle, Attorney of the United States of America for the Western District of Washington, who for the said United States in this behalf prosecutes in his own person, comes here into the District Court of the said United States for the District aforesaid on this 30th day of September, 1926, in the same term,

and for the said United States gives the Court here to understand and be informed that: [29]

COUNT I.

That on the twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-five, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, EUGENE RODGERS, then and there being, did then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit, two (2) pints and two-thirds (⅔) of a pint of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, intended then and there by the said EUGENE RODGERS, for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away, and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said EUGENE RODGERS, as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [30]

And the said United States Attorney for the said

Western District of Washington, further informs the Court:

COUNT II.

That EUGENE RODGERS, on the twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-five, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, and at a certain place situated at 101½ Occidental Avenue, known as the Kentucky Bar, Seattle, Washington, then and there being, did then and there and therein knowingly, willfully, and unlawfully conduct and maintain a common nuisance by then and there manufacturing, keeping, selling, and bartering intoxicating liquors, to wit, distilled spirits, and other intoxicating liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, and which said maintaining of such nuisance by the said EUGENE RODGERS, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,
United States Attorney.
PAUL D. COLES,
Assistant United States Attorney.

[Endorsed]: Filed Sep. 30, 1926. [31]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare transcript on appeal herein consisting of—

1. Writ of scire facias.
2. Amended return to writ of scire facias.
3. Waiver of jury.
4. Bill of exceptions with exhibits attached thereto.
5. Order extending time for filing bill of exceptions.
6. Judgment.
7. Notice of appeal.
8. Citation on appeal.
9. Assignments of error.
10. Supersedeas bond on appeal.
11. This praecipe.

CALDWELL & LYCETTE,
Attys. for Appellant.

NOTICE.

Attorneys will please indorse their own filings, Rule 11.

[Endorsed]: Filed May 12, 1928. [31½]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 31, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [32]

Clerk's Fees (Act Fe. 11, 1925) for making record, certificate or return, 65 folios at 15¢ ..... $ 9.75

Certificate of Clerk to Transcript of Record, with seal ..... .50

Total $10.25

I hereby certify that the above cost for preparing and certifying record, amounting to $10.25, has been paid to me by the attorney for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 17th day of May, A. D. 1928.

[Seal] ED. M. LAKIN,

Clerk United States District Court, Western District of Washington,

By S. E. Leitch,
Deputy. [33]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

To the UNITED STATES OF AMERICA, Plaintiff, and to THOS. P. REVELLE, PAUL D. COLES and DAVID L. SPALDING, Its Attorneys:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, to be held at the City of San Francisco, State of California, in the Ninth Judicial Circuit, within thirty days from date hereof, pursuant to a notice of appeal filed in the office of the clerk of the above-entitled District Court, appealing from the final judgment signed and filed herein on the 2d day of April, 1928, wherein the United States of America is plaintiff and the National Surety Company, a corporation, is defendant and appellant; to show cause, if any there be, why the judgment rendered against the said appellant as in said notice of appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, Northern Division, this 1st day of May, 1928.

[Seal] EDWARD E. CUSHMAN,
United States District Judge.

Received copy 5/1/28.

D. SPAULDING.

[Endorsed]: Filed May 1, 1928. [34]

[Endorsed]: No. 5498. United States Circuit Court of Appeals for the Ninth Circuit. National Surety Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 21, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5498

NATIONAL SURETY COMPANY, a corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Appellant's Opening Brief

CALDWELL & LYCETTE,
Attorneys for Appellant.

1311 Alaska Building
Seattle, Washington

MARTIN & DICKSON, *Printers*

In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5498

NATIONAL SURETY COMPANY, a corporation,
Appellant,

v.

UNITED STATES OF AMERICA ,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Appellant's Opening Brief

This is an appeal from a judgment in favor of the United States on a contested scire facias proceeding on a bail bond. The testimony is short and uncon-

tradicted. The case was tried before the court without a jury, a written waiver of jury having been made as required by law (Tr. 13).

STATEMENT OF CASE

Pleadings

Writ of scire facias. The writ of scire facias (Tr. 2-3) alleges that on *February 24th,* 1925, a bail bond for $750.00 was executed by Eugene Rodgers and the National Surety Company (appellant); that said bond was conditioned for the appearance of Rodgers before the district court at Seattle, "during the *May* 1926 term" of said district court and from time to time and term to term thereafter, to answer a charge of the United States *exhibited* against him; that said bond was filed on February 28th, 1925; that thereafter, on January 3rd, 1927, and at a proper term of court, Rodgers being called to answer said charge, came not but made default; that thereupon, on motion of the United States it was considered that Rodgers and the National Surety Company forfeit to the United States the sum of $750.00 according to the terms of said bond, unless they show cause to the contrary. Then follows the command to show cause why the forfeiture nisi should not be made absolute.

Amended Answer (Tr. 4). Paragraph I of the amended answer admits that on February 24th, 1925, the defendant executed a $750.00 bail bond for Rodgers, but denies that said bond was conditioned for appearance of Rodgers before the district court during the May 1926 term, or any other time. And denies each and every allegation of said writ.

First Affirmative Defense (Tr. 5) alleges that Rodgers complied with each and every term and condition of said bond of February 24th, and said bond was thereby terminated.

Second Affirmative Defense (Tr. 6). Paragraph I alleges that the bond of February 24th, 1925 required Rodgers' appearance before a commissioner; that Rodgers appeared as required, and that said commissioner bound Rodgers over to the district court and required him to file a final bond for appearance before the district court; that Rodgers thereupon did file such a final bond, on February 27th, 1925, and was released thereon; that thereby the first bond was released.

Paragraph II (Tr. 6) alleges that said final bond of February 27th was not conditioned for the appearance of said Rodgers "during the May 1926

term of said court and from time to time and term to term thereafter," as set forth in the writ of scire facias; and denies that said Rodgers was called to come into court and answer the charge brought against him at any time; and denies that said Rodgers made default under said bond.

Third Affirmative Defense alleges that said bond is void (Tr. 7):

> "That the bond filed in this cause is null and void and of no affect whatsoever, for the reason that the condition of the bond, as it appears upon the face thereof, was that the said defendant, Eugent Rodgers, should appear and answer as follows: 'On the ..... day of ..... term, to be begun and held in the City of Seattle in said District on the ..... day of the present term 1925, and from time to time and term to term thereafter'; that said bond is void for the reason that no definite date is set for the appearance of said defendant."

The Fourth Affrmative Defense (Tr. 8) alleges:

> "That said bond was executed on the 27th day of February, 1925; that said bond is, on its face, conditioned for the appearance of the defendant on the ..... day of ..... term to be begun and held at the City of Seattle in said district on the ..... day of the present term, 1925, and from time to time and term to term thereafter, to which the case may be continued; that said Eugene Rodgers was not called to ap-

pear during said 'present term,' nor at any time during said 'present term,' nor was said defendant, Eugent Rodgers, called during the following term or at any term during 1925, nor at any term during 1926, nor at any time until the 3rd day of January, 1927, as set forth in said writ of scire facias herein; that by reason of said facts said Eugene Rodgers did not violate the conditions of his said bond, and said defendant was never called at any proper term of said court."

Fifth Affirmative Defense alleges (Tr. 8):

"That at the time said bond was executed by the National Surety Company, said bond provided for the appearance of said defendant on the ..... date, 1925, and from time to time thereafter; that after the delivery of said bond, and without the knowledge or consent of the National Surety Company, said bond was materially altered and changed by the addition therein of the words 'present term,' and by the addition of the words 'term to term'; that the said National Surety Company is informed and believes that said additions were made in ink thereon after the delivery of said bond, by R. W. McClellan, the United States Commissioner, to whom the said bond was offered for approval; that said changes were made without the authority or approval of the National Surety Company; that said alterations and changes increase and enlarge the liability of the National Surety Company and are material alterations; that by reason of said alterations the liability of the National Surety Company on said bond was and is terminated, and said bond became null and void."

Sixth Affirmative Defense (Tr. 9) alleges:

"That said bond so filed in this cause was and is null and void by reason of the following facts, to-wit: That said bond, on its face, provides as follows: That said defendant is required 'then and there to answer the charge of having on or about the ..... day of ..... A.D. 192.., within said district, in violation of section .... of the ..... (Act of.....) (Criminal Code) (R. S.) of the United States, unlawfully violating the National Prohibition Act;' that by the terms of said bond this defendant, Eugene Rodgers, was not bound to answer any charge of whatsoever kind or nature under the laws of the United States; that by reason of the failure of said bond to provide for the defendant's answering for a definite and known or specific charge under the laws of the United States, said bond was and is null and void and there is no liability whatsoever on the surety, and National Surety Company; that by reason of the foregoing facts said Eugene Rodgers was not called to answer any charge and there being no charge mentioned in said bond, said Eugene Rodgers did not violate the condition of said bond."

Seventh Affirmative Defense (Tr. 10) alleges:

"That if the condition of said bond was that the defendant answer to any charge whatsoever against him, then he was only bound by said bond to answer a single charge; that instead of filing a single charge against said defendant, the said plaintiff, United States of America, on the 30th day of September, 1926, filed an information against said defendant in the above entitled action, in two counts, charging the said

defendant with two violations of the National Prohibition Act, to-wit: On the first count, unlawfully possessing intoxicating liquors on the 21st day of February, 1925, and on the second count, unlawfully maintaining a common nuisance by manufacturing and selling intoxicating liquors on February 21st, 1925, at the premises known as 101½ Occidental Avenue, Seattle; that by reason of the plaintiff's having filed more than one charge against the defendant in the above entitled action and under said bond, the risk of the surety was greatly increased; that by reason of said facts the liability of said surety was and is terminated, and said surety was and is released."

Seventh Affirmative Defense (Tr. 11) alleges:

"That no notice of whatsoever kind or nature was given to the National Surety Company to produce said defendant, prior to the date of forfeiture herein; that said forfeiture was and is premature and improper, in that said action was set for trial on February 8, 1927, and thereafter continued to March 8, 1927, and thereafter continued to March 15th, 1927, all of which dates are subsequent to the date of the alleged forfeiture of said bond."

REPLY

No reply was made to the amended answer.

BILL OF EXCEPTIONS (Tr. 21).

Upon the trial evidence was produced and the following procedure occurred:

Plaintiff's case: Mr. Simon (district attorney) offered in evidence the bond, exhibit 1, (Tr. 26) to which an objection was made that it was not the bond on which the writ was brought—the writ being brought on the bond executed February 24, 1925, and the bond offered being dated February 27, 1925. Thereupon plaintiff moved to amend the writ changing the date alleged from February 24th to February 27th, to which an objection was made, as follows: (Tr. 21).

> "On the ground that the writ referred to the bond executed on the 24th and not on the 27th, and on the further ground that the bond of February 24th mentioned in the writ is on file, and that the answer filed to that bond has not been controverted and nothing done."

The amendment was allowed and the bond admitted in evidence over objection, and the exception of the defendant noted.

It was then admitted that defendant executed the bond, exhibit 1, and that it was filed February 28th. Plaintiff then read into evidence certain lines from the clerk's docket in Cause No. 11028, as follows: "Line one, September 30, 1926, filed information; line two, January 3, 1927, enter order forfeiting bail and for bench warrant." Thereupon the government

rested and defendant moved for a non-suit upon the ground that the government's case showed affirmatively that there was no cause of action, and showed affirmatively that there was a good defense thereto. The motion was denied. Thereupon defendant offered in evidence lines 2, 3 and 4 of the clerk's docket, line 4 being, (Tr. 23) "January 3, 1927, enter order for trial February 8th, 1927"; line 7, reading, "February 8, 1927, entered order trial March 8, 1927"; line 11 reading, "March 9, 1927, entered order trial March 15th, at foot of calendar;" line 4 reading, "March 15, 1927, entered order, cause over term."

Thereupon John P. Lycette was sworn as a witness for the defendant and testified that he is one of the attorneys for the National Surety Company and handled the bail bond forfeitures; that he investigated the records of the company and found that the bond issued by the National Surety Company in this case originally did not have the written words "present term" or "term to term" in it; that no authority was given to put these words in; that the words appear to be in the handwriting of the United States Commissioner; that said words were

not in the bond when it left the office, nor were they put there with the company's consent; that the company has the original bond form with the words "term to term" printed in, if they desire to use a bond of that nature they use the printed form containing these words; that he did not know when the alteration was made except that it was made after it left defendant's office.

Thereupon the information was offered in evidence as exhibit A-2. Both sides rested and the court then entered judgment for the plaintiff, to which an exception was taken.

Formal judgment was thereafter entered (Tr. 13) and an exception thereto taken.

ASSIGNMENTS OF ERROR (Tr. 17)

Errors were assigned as follows:

(1) That the district court erred in refusing to grant defendant's motion for non-suit;

(2) That the court erred in granting judgment for the plaintiff;

(3) That the court erred in refusing to grant judgment for the defendant dismissing the cause.

ARGUMENT

The three assignments of error simply present the question of whether or not the simple and uncontradicted evidence was sufficient to establish the plaintiff's case and warrant judgment for plaintiff, rather than defendant.

NATURE OF SCIRE FACIAS AND PROOF REQUIRED

Scire facias on a bail bond is the commencement of a new and original civil suit or action. The writ is the complaint or declaration and must set up a complete cause of action. The defendant must plead by demurrer or answer, and may set up any defense defeating the right of the plaintiff to have judgment.

Hollister v. U. S., 145 Fed. 773, 779;

Kirk v. U. S., 124 Fed. 324;

Kirk v. U. S., 131 Fed. 331;

Winder v. Caldwell, 14 L. Ed. 487, 491;

U. S. v. Hall, 37 L. Ed. 332; 147 U. S. 687;

Universal Transport Co. v. National Surety Co., 252 Fed. 293;

Davis v. Packard, 8 L. Ed. 684;

Dixon v. Wilkinson, 11 L. Ed. 491;
24 *R.C.L.* 676, Sec. 17;

3 R. C. L. 65, Sec. 80;

35 *Cyc.* 1152-4-8;

Foster on Federal Practice, pp. 2379-83.

In *Kirk v. U. S.,* 124 Fed. 324, it is said at p. 336:

> "In scire facias proceedings properly instituted by due service, the defendant may appear and plead and have a trial of all questions and matters of defense, and the proceeding is but a suit to enforce the penalty of the recognizance, and differs from any other suit to enforce it only in the process by which it is commenced."

The burden of proof is on the plaintiff, and it must prove all the essential allegations of the writ (complaint) by competent evidence. The record on which the writ is issued is not a part of the writ, but must be introduced in evidence to prove the case. When introduced it must support the allegations of the writ or the plaintiff fails. See cases cited above.

Hollister v. U. S., 145 Fed. 773, contains a complete discussion of scire facias. It is there laid down that the record on which the case issues it not a part of the case, but is evidence which must be introduced to prove the case. In that case it is said, after discussing Supreme Court decisions, at p. 780:

> "From the principles announced in the foregoing authorities certain conclusions inevitably follow: First, the record upon which the writ

> issues is not a part of the declaration. *It is the evidence* on which plaintiff must rely to prove the case, and the legal sufficiency of the declaration must be determined, as in ordinary cases of pleading, from the consideration of its averments."

The court then points out, p. 781, that the records must be offered in evidence to prove the facts alleged, saying:

> "The record, when offered to prove the case, must disclose them or the case fails."

It was further held than on a denial the case presents a question of fact requiring a trial by jury.

In *Hunt v. U. S.*, 61 Fed. 795, an action of scire facias on a bail bond, the question arose as to how to prove the allegations of the writ. The court said:

> "A writ of scire facias, when issued, should only recite facts disclosed by the records and files of the court from which the writ emanates. Therefore, when the defendants named in the writ of scire facias, by way of defense thereto, deny any of its recital, *it is incumbent on the plaintiff to verify the same by producing the records and files, and the facts in question cannot be otherwise proven.*"

I.

This Being a Civil Action the Pleadings are Governed by the State Procedure

U. S. Comp. Stat. Sec. 1537;

Revised Stat. Sec. 914.

Rule 10 of the district court provides:

> "In actions at law the pleadings shall be in accordance with the laws of the state as the same shall exist at the time in question * * *"

The Washington statutes require an answer consisting of a general or specific denial, and permits affirmative defense.

Remington's Comp. Stat., Sec. 264:

"The answer of the defendant must contain

> (1) A general or specific denial of the material allegations of the complaint controverted by the defendant * * * (2) A statement of any new matter constituting a defense * * *"

Where affirmative matter is pleaded it requires a reply. *Rem. Comp. Stat.* Sec. 278:

> "If the answer contain a statement of new matter constituting a defense or counterclaim, and the plaintiff fails to reply or demur thereto * * * the defendant may move the court for such judgment as he is entitled to on the pleadings * * *"

In this case the answer was in effect a general denial with affirmative defenses. Paragraph 1 (Tr. 5) admitted the giving of a bond on *February 24th,* but denied the condition of the bond as alleged, and then denies each and every other allegation in the writ.

This required plaintiff to prove every material allegation of the writ.

A. The Plaintiff's Proof Utterly Fails to Establish the Essential Facts Alleged in the Writ

1. *The bond proved was executed and dated at a different time from the bond alleged.*

The writ alleges that a bond was executed on February 24th, 1925, for appearance under certain conditions. The answer admitted (Tr. 5) that the bond was executed on said date, but denied the conditions. The answer further alleges by first affirmative defense (Tr. 5) that the defendant complied with said bond of February 24th. The second affirmative defense (Tr. 6) alleges that the bond of February 24th was complied with by appearance, and the prisoner released on a second bond executed February 27th.

The bond offered in evidence, exhibit 1, (Tr. 26) is dated February 27th, *not* February 24th. When the bond was offered an objection was made (Tr. 21) that the bond was not the bond sued on—that the bond dated February 24th was on file—that the answer filed to that bond had not been controverted. The plaintiff then asked to amend the date from February 24th to February 27th. This was allowed over the defendant's objection and exception.

This was error and constituted a fatal variance.

Farris v. People, 58 Ill. 26;
Eckert v. Phillip, 4 Pa. Co. Ct. 514;
Highsaw v. State, 19 S. W. 762;
Bolinger v. Bower, 14 Ark. 27;
Avant v. State, 26 S. W. 411;
Smith v. State (Miss.) 25 So. 491;
Dailey v. State, 22 S. W. 4;
Brown v. State, 11 S. W. 1022.

In *Avant v. State,* 26 S. W. 411, it was said:

> "The judgment nisi recited that the bond was entered into on July 12th, 1892, whereas the scire facias served upon the parties defendant recites that it was entered into on the 9th of July, 1892. This constitutes a fatal variance."

In *Smith v. State,* (Miss.) 25 So. 491, the rule is stated in the syllabus:

> "A variance between the judgment nisi and the scire facias as to the date of the former is fatal to the judgment final rendered on the latter."

2. *The bond proved is conditioned different than the bond alleged.*

The writ alleges that the bond was conditioned for appearance "during the *May, 1926,* term of said district court and from time to time and term to term thereafter." The bond, exhibit 1, (Tr. 26) is conditioned for appearance "on the ..... day of present term, 1925," and is dated February 27th, 1925, The "present term" would therefore be the November, 1924, term.

Such a substantial variance between the writ and the bond (writ alleges May 1926 term—bond reads present (November 1924) term) is fatal under all of the authorities. See cases cited above.

In 35 *Cyc.* p. 1158 the rule is well stated:

> "A substantial variance between the obligation of record and as recited in the writ from that offered in evidence, or between a pleading and the evidence offered in support thereof, is fatal."

3. The writ alleges (Tr. 2) that the bond was to answer "a charge *exhibited* against the said defendant."

This allegation was essential. 6 C. J. 1064. Plaintiff, however, failed to prove that the charge was "exhibited," and furthermore the evidence shows that though the bond is dated February 27th, 1925, no charge was filed until September 30th, 1926 (Tr. 22, 28, 30).

4. *It is alleged that the defendant was duly called but came not. Proof of this fact is essential to establish a forfeiture.*

U. S. v. Rundlett, 27 Fed. Cas. 16208;

Dillingham v. U. S., 7 Fed. Cas. 3913;
6 *C. J.,* 1072;

Brooks v. U. S., (Okla.) 27 Pac. 311;

Note in 5 *L. R. A.* (N. S.) 402;

State v. Dorr, (W. Va.) 53 S. E. 120, 5 L. R. A. (N. S.) 402;

State v. Kinne, 39 N. Hamp. 138;

Philbrick v. Buxton, 43 N. Hamp. 463.

In *Dillingham v. U. S.* 7 Fed. Cas. 3913, plaintiff failed to prove that the defendant was called. The Honorable J. Washington held this a necessity, saying:

> "We hold it to be essential to the breach of the condition upon which the forfeiture is to arise, that the party who is recognized to appear, shall be solemnly called before his default

> is entered; and even if the default can be proved by the parol evidence of the magistrate before whom the appearance was to be, which we very seriously question, it should clearly be proved that the party was called and warned, *and neglected to appear.* This is far from being a matter of form only, but, on the contrary, is a humane provision to prevent a forfeiture accruing from the ignorance or inattention of the accused."

In *U. S. v. Rundlett,* 27 Fed. Cas. No. 16208, an action on a recognizance, it was said:

> "To maintain an action on a recognizance the declaration must show a breach of the conditions * * * One of these rules of law requires the principal cognizor to be called and his default entered; the legal effect of the condition is such, that it is not broken by non-appearance, generally, to be proved by any evidence, but only *non-appearance* in answer to a call, to be proved by an entry made on the minutes of the magistrate, and returned by him as part of the proceeding. This has been decided in New Hampshire, and elsewhere, upon reasons which to me are satisfactory. *State v. Chesley,* 4 N. Hamp. 366; *Dillingham v. U. S.,* Fed. Cas. No. 3913; *State v. Grigsby,* 3 Yerg. 280; *White v. State,* 5 Yerg. 183; *Clark v. State,* 4 Ga. 329. It is clear also that the declaration must show a default to answer a call, made at a time and place, when and where the cognizor was bound by law to answer."

In *Brooks v. U. S.* (Okla.), 27 Pac. 311, in a suit on a recognizance, it was held, at p. 311:

> "Every precedent in such action, which we have found, indicates that such suits are always based on recognizances duly forfeited by judicial order, and that the declaration in every such case must allege that the defendant in the recognizance was duly called at the proper time and place, and the recognizance forfeited. It is unquestionable that the breach must be established by record, and cannot be shown by proof *aliunde*. *People v. Van Eps.* 4 Wend. 388. It is essential to a breach of the contract of a recognizance that the declaration must show that the party who was to appear was solemnly called and warned."

Did the plaintiff prove that the defendant was called?

Examining the bill of exceptions (Tr. 21) it will be found that the government offered the bond in evidence (Tr. 22), and then it read in evidence two entries from the clerk's docket thus (Tr. 22): "Line one, September 20, 1926, filed information; Line two, January 3, 1927, enter order forfeiting bail and for bench warrant." Thereupon the government rested.

Clearly there was no proof that the defendant was ever called. Under the decisions this was essential to the plaintiff's case.

5. *There was no proof whatsoever that the defendant "came not."*

It was alleged that the defendant failed to appear in answer to the call. Under a general denial it was just as necessary to prove that the defendant "came not" as it was to prove that he was called. Not one scintilla of evidence was offered to prove that the defendant "came not." Without this the case must fail.

6. *There was no proof whatsoever that the surety was called to produce the defendant.* This point was pleaded specially by the defendant (Tr. 11).

The bond (Tr. 26) is joint and several. Therefore it was essential that the surety be called. In 3. R.C.L. p. 62, Sec. 75, it is said:

> "Where the recognizance in its form is several rather than joint, it seems that it is necessary that each recognizance, namely, that of the surety as well as that of the principal, should be separately forfeited in the usual manner. The prisoner should be called to appear, and the bond should be called to bring forth the body of the prisoner whom he undertook to have there that day, or forfeit his recognizance."

7. *There was no proof whatsoever of the judgment nisi.*

Under a general denial it was essential to prove the judgment nisi as alleged. See cases cited above, particularly *Hunt v. U. S.,* 61 Fed. 795; *Nelson v.*

State, 73 S. W. 398; *General Bonding Co. v. State,* 165 S. W. 615; *McWhorter v. State,* 14 Tex. App. 239; *Hollister v. U. S.,* 145 Fed. 773.

In *Hollister v. U. S.,* 145 Fed. 773, it is said, at p. 781, that the record must be offered in evidence to prove the facts alleged:

> "The record, when offered to prove the case, must disclose them (the facts) or the case fails."

In *Nelson v. State,* 73 S. W. 398, the syllabus states the holding of the court as follows:

> "In scire facias on a forfeited bail bond it is essential that the judgment nisi be introduced in evidence."

In *General Bonding Co. v. State,* 165 S. W. 615, it was held that failure to prove the judgment nisi was fatal.

In *Hunt v. U. S.,* 61 Fed. 795, an action of scire facias on a bail bond, it was held that the allegations of the writ must be proved by the records and files, the court saying:

> "A writ of scire facias, when issued, should only recite facts disclosed by the records and files of the court from which the writ emanates. Therefore, when the defendants named in the writ of scire facias, by way of defense thereto, deny any of its recital, *it is incumbent on the plaintiff to verify the same by producing the*

*records and files, and the facts in question cannot be otherwise proven * * *"*

The strictness with which this rule is applied is demonstrated by the numerous cases cited above, to the effect that a variance between the dates of the judgment nisi as alleged and as offered in evidence, is fatal.

Here the government did read from the clerk's docket one line, (Tr. 22) as follows: "January 3rd, 1927, enter order forfeiting bail and for bench warrant." This, however, is not sufficient as it neither states the person, amount, bond, nor condition. This single entry certainly cannot constitute a judgment nisi sufficient to support a scire facias.

In pleading the judgment nisi it is necessary to state with particularity the details concerning the alleged judgment.

In 24 R. C. L. p. 677, Sec. 18, it is said:

> "In scire facias proceedings to revive a judgment, the judgment must be stated with as much particularity as would be required in a complaint or declaration. An immaterial variance in the recital of the judgment is not fatal, but a substantial variance will prevent the continuance of the lien, and a subsequent amendment will not cure it. * * * A scire facias is defective if it fails to state the date of the judgment * * *

> And if the date as it appears of record does not correspond with that of the judgment as set forth in the scire facias, it is such a variance as will authorize the rejection of the record when offered in evidence. So, a substantial variance in the recital of the amount is fatal under the plea of nul tiel record. * * * It is sufficient if the judgment is in substance what it is recited to be."

The proof should at least support the necessary allegations. Here there is no proof of the *amount,* and in fact the proof offered is for no amount whatsoever. It does not show whom the judgment, if any, is against. It is wholly lacking in the essential facts.

Hence the action fails for proof of the facts (judgment nisi) upon which it is predicated.

II.

There Was a Material Unauthorized Alteration of the Bond After Its Execution

An examination of the original bond, exhibit 1, will show certain alterations in ink. These alterations are not disclosed by the printed copy in the transcript.

In the fifth affirmative defense it is alleged (Tr. 8-9):

"That at the time said bond was executed by the National Surety Company, said bond provided for the appearance of said defendant on the ..... date, 1925, and from time to time thereafter; that after the delivery of said bond, and without the knowledge or consent of the National Surety Company, said bond was materially altered and changed by the addition therein of the words 'present term,' and by the addition of the words 'term to term'; and that said National Surety Company is informed and believes that said additions were made in ink thereon, after the delivery of said bond, by R. W. McClelland, the United States Commissioner, to whom the said bond was offered for approval; that said changes were made without the authority or approval of the National Surety Company; that said alterations and changes increase and enlarge the liability of the National Surety Company and are material alterations; that by reason of said changes and alterations, material in character, the liability of the National Surety Company on said bond was and is terminated, and said bond became null and void."

No reply was made to this defense. Under *Rem. Comp. Stat. of Washington,* Sec. 264 and 278, quoted above, a failure to reply admits the allegations of the affirmative defense. See also *Johnson v. Maxwell,* 2 Wash. 482, 25 Pac. 570; *Smith v. Ormsby,* 20 Wash. 356, 55 Pac. 570; and *Pierce v. Brown,* 7 Wall. 205, 19 L. Ed. 134.

These allegations proved. These allegations were proved by uncontroverted evidence (Tr. 3-4); that

at the time the bond was executed by appellant, it did not contain the words "present term" or the words "term to term"; that these were added by some one after the bond left appellant's office, and were added without authority from appellant.

The words added are in ink, and appear to be in the handwriting of the commissioner before whom the bond was taken.

WHERE ALTERATIONS OR INTERLINEATIONS ARE MADE IN AN INSTRUMENT IN HANDWRITING DIFFERENT FROM THE REST OF THE INSTRUMENT, THEY ARE PRESUMED TO HAVE BEEN MADE AFTER EXECUTION. THE BURDEN IS ON THE PARTY OFFERING THE INSTRUMENT TO EXPLAIN THEM.

Cox v. Palmer, 3 Fed. 16;

Note in 236 *Fed.* 237;

Zeigler v. Hallahan, 131 Fed. 205;

A material alteration discharges the sureties. 6 C. J. 1026;

Reese v. U. S., 19 L. Ed. 541;

U. S. v. Backland, 33 Fed. 156.

In 6 *C. J.,* 1026, it is said:

"A material alteration of the bond or recognizance after its final execution, either by erasures or striking out or adding to the same, with-

> out the sureties' knowledge or consent, releases them."

Citation of authority is hardly necessary for the proposition that a material alteration of a bond after execution renders it void. Here there is clearly an alteration unexplained by the plaintiff, and proved by defendant to have been made after execution. This discharges the surety.

III.

The Bond is Void Because No Time is Stated for Appearance.

It appears from an examination of the bond (Tr. 26), as alleged in the third affirmative defense, (Tr. 7) that the bond is conditioned that the defendant appear and answer as follows:

> "On the ..... day of ..... term, to be begun and held in the City of Seattle in said district, on the ..... day of the present term, 1925, and from time to time and term to term thereafter."

1. As pointed out above, the words "present term" and "term to term" were added after the bond was executed. Without those words there would be no date whatsoever for appearance. And under the cases cited below, this renders the bond void.

Even with the words in the bond, there is no definite time for appearance, and hence the bond is void.

In *Joelson v. U. S.,* 281 Fed. 106, (CCA) the court had under consideration a bond containing blanks, very similar to the one here in question. The bond is set out in the opinion. The court held that it was too indefinite to support a judgment, saying at p. 108:

> "The recognizance provided that Rosen should appear 'on the first day of ..... term to be begun and held at ....., on the ..... day of 192.., at .... o'clock .... M., and from time to time thereafter, to which the case may be continued * * * then and there to abide the judgment of said court and not depart without leave thereof.' It appeared, therefore, that the recognizance did not require Rosen to appear at any particular place or time.
>
> "Like other contracts, it (bond) must be construed according to its express terms, and where it is defective as to the place and time at which defendant is to appear, these may not be supplied by intendment * * * If the place and time of appearance by defendant are not expressly stated in a recognizance, and these cannot be fixed by other terms in it, the omission is fatally defective (citing cases.) * * * Under the terms of the contract, Rosen was under no obligation whatsoever to appear at any time or place before the court. The omission of the condition was a fatal defect, and the recognizance was a nullity."

IV.

The Defendant Was Not Called At Any Time Covered by the Bond.

The bond is dated February 27th, 1925. When executed it did not require the defendant to appear from "term to term," but merely required defendant's appearance at the "..... day of present term, 1925." The writ alleges that the bond was conditioned for appearance at the "*May* 1926 *term.*" This is clearly erroneous as shown by government's exhibit 1 (Tr. 26).

No information was filed until September 30, 1926 (Tr. 22-28). Defendant was not called (if called at all) until January 3, 1927, or nearly two years after the giving of the bond.

Thus, the defendant was not called during the "present term, 1925," which was the November, 1924, term, as required in the bond. The information itself was not even filed until more than a year and a half after the giving of the bond.

The defendant was not called until five terms after the date set for appearance in the bond.

Under this form of bond the sureties were not obligated to produce the defendant at any term

other than the "present term 1925" (November 1924 term).

U. S. v. Mace, 281 Fed. 635 (8 CCA);
U. S. v. Keiver, 56 Fed. 422;
U. S. v. Backland, 33 Fed. 156;
Reese v. U. S., 19 L. Ed. 541;
6 *C. J.* 1035; 1038;
3 *R.C.L.* p. 41, Sec. 47;
Arnstein v. U. S., 296 Fed. 946;
Joelson v. U. S., 281 Fed. 106; (CCA 3)
Colquitt v. Smith, 65 Ga., 341;
Goodwin v. Governor, 1 Stew. & T. (Ala.) 465;
State v. Becker, (Wis.) 50 N. W. 178;
Lane v. State, (Kan.) 50 Pac. 905;
Commonwealth v. Summers, 14 Pa. Co. Ct. 159;
State v. Dorr, (W. Va.) 53 S. E. 120;
State v. Mackey, 55 Mo. 51;
Ramey v. Commonwealth, 6 Ky. L. Rep. 524;
Swank v. State, 3 O. St. 429;
Hesselgrave v. State, (Neb.) 89 N. W. 295;
Sampson v. Harris, (Ga.) 94 S. E. 558;
Collins v. Smith, 67 S. E. 847;
Gebhart v. Drake, 24 O. St. 177;
State v. Moore, 57 Mo. App. 662;

State v. Murdock, (Neb.) 81 N. W. 447;
Perkins v. Nilson, (Neb.) 90 N. W. 756;
Townsend v. People, 14 Mich. 388.

In *U. S. v. Mace,* 281 Fed. 635 (8 CCA) the court had under consideration a bond nearly identical to the one here in question. The bond is set out at length at page 636. It was conditioned to appear on the first day of the term and time to time as continued. The bond was given September 21st, 1918, during the April 1918 term. On December 19th, 1918, a new term was called, and the bond was forfeited. It was held the bond required the defendant to appear only in the term mentioned, the court saying, p. 639:

> "The bond here under consideration called for the appearance of C. at the April term, 1918, of the United States District Court, being the term in session at the time the bond was given. The amended petition filed by the government alleges that C was called for trial December 19th, 1918. This was the September term, 1918, a term distinct and separate from the April term. The forfeiture was entered at the September term. At that time the bond had no vitality. It may be conceded that a mistake was made in the date of the bond, and the error is an unfortunate one for the government, but this court must take the bond as it finds it and construe it according to law. It would not be far afield to hold the bond void for uncertainty.

> The only way it can be sustained at all is to uphold it as a bond applying to the term of court in session, and limiting its life to that term."

In *U. S. v. Keiver,* 56 Fed. 422, the bond was conditioned for appearance at a certain term. The defendant was not called. It was held that his bond could not be forfeited at some subsequent term after two regular terms had elapsed at which the defendant might have been tried, the court saying, at p. 426:

> "And if he (judge) can pass over two general terms of the court at which the prisoner might be tried, there is no reason why he might not pass over three or any number of terms."

In the case at bar, the case was continued over five terms, thereby greatly and inequitably enlarging the obligation of the surety.

In *U. S. v. Backland,* 33 Fed. 156, it was held that where a bond is conditioned for appearance at one term and no indictment or information is filed, the bond is discharged and cannot be held for appearance during the following term.

In 6 *C. J.,* 1035, it is stated:

> "As a general rule, when the bond or recognizance specifies the term and place at which

the accused is to appear, he is not bound to appear, and the bond or recognizance cannot be forfeited for his failure to appear at any other term or place. Thus in such a case he is not, as a general rule, bound to appear before any other court, or at any other place, or during any other term or day than that specified in the undertaking; and it has been held that if the time of holding the court is subsequently changed from the day set for it, a failure to appear on the day to which it is changed does not operate as a forfeiture."

And so, at page 1038:

"But where the obligation of the bond is not a continuing one, (term to term), the bail are entitled to discharge at the term designated for appearance. Thus, it has been held, that, where the condition is for appearance at the next term and from day to day, it applies only to that particular term of court, and that an adjournment to a subsequent term is not within the contract of the recognizance, and operates to discharge it."

In 3 *R. C. L.*, p. 41, Sec. 47, it is stated:

"Ordinarily recognizances or bail bonds obligate the surety to procure the appearance of their principal at the next, and not at any subsequent term. Where recognizance in a criminal case is conditioned 'that the principal appear at the next term and thereafter from day to day and not depart without leave,' or contains the further condition that he 'shall abide the judgment of the court,' the surety is bound for the appearance of the prisoner during the first term of the court only, and if court adjourns without making any order, the sureties are exonerated from their recognizance."

In *Reese v. U. S.,* 19 L. Ed. 541, the bond was conditioned "from term to term." It there appeared that the case was continued nearly two years. The court held that even though the bond was conditioned from term to term, the unreasonable and long delay operated to discharge the surety.

V.

Bail Discharged Under the Law

The conditions of a bail bond in a federal court are governed by the law of the state in which the federal court is located.

Rev. Stat., Sec. 1014, Comp. Stat. Sec. 1674;

U. S. v. Ewing, 140 U. S. 142, 35 L. Ed. 388;

U. S. v. Patterson, 150 U. S. 67; 37, L. Ed. 997;

U. S. v. Keiver, 56 Fed. 422;

U. S. v. Mace, 281 Fed. 635;

U. S. v. Sauer, 73 Fed. 671;

U. S. v. Zarafontias, 150 Fed. 97;

U. S. v. Case, Fed. Case No. 14742;

U. S. v. Maresca, 266 Fed. 713;

U. S. v. Horton, 26 Fed. Cas. No. 15393.

Sureties Discharged Under Washington Decisions

Rem. Comp. Stat. of Washington provide:

Sec. 2311: "Whenever a person has been held to answer to any criminal charge, if an indictment be not found or information filed against him within thirty days, the court shall order the prosecution to be dismissed, unless good cause to the contrary be shown."

Sec. 2312: "If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown."

Under the above statutes and rules the court should adopt the decision laid down by the Supreme Court of the State of Washington in *State v. Lewis,* 35 Wash. 261, 77 Pac. 198, which was affirmed in *State v. Caruso,* 137 Wash. 519, at 529, 243 Pac. 14. In *State v. Lewis* the defendant was admitted to bail on May 25th, 1901. No information was filed until October 9th, 1901. Prior to that time the defendant moved the court to dismiss the action for failure to file the information. But this court declined to do so because the defendant did not personally appear in court. On October 14, 1901, the bail was forfeited for failure of the defendant to appear. On December 2nd the case was dismissed.

The sureties appealed from the judgment against them on the bail bond. The court held that the

statutes of Washington required the filing of an information are mandatory; that unless this is done the bail is discharged. This was so held even though the forfeiture took place before the case was dismissed. The court, after quoting the statutes above set forth, held, p. 268:

> "The same line of reasoning, when applied to the above section, 6910 (Sec. 2311 *supra*), *clearly* implies that the provisions of this section are mandatory; that, 'if an indictment be not found or information filed against him (the defendant) within thirty days, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown'; that such cause should appear, or be shown by, the record, unless waived in some manner by the defendant or accused. In other words, when the indictment shall not have been found, or information filed, within thirty days after the defendant has been held to answer a criminal charge, the prosecution must assume the burden of showing a reasonable excuse or justification for its omission to do so. Otherwise, the defendant is entitled to his discharge, and a dismissal of the prosecution, as a matter of right.
>
> "When it shall have been determined that such right to discharge and dismissal exists in defendant's behalf, it would seem logically to follow that this right inures to the advantage of the sureties on the defendant's bail bond."

The court then quotes from a California decision to the same effect, and continues, (p. 269):

"There are authorities holding that, where a bail bond has been executed by defendant and sureties, conditioned that the bail shall appear at the next term of the court named in the instrument, to answer a criminal charge, and continuances are had from term to term without the finding of any indictment or the presentment of any information against the principal, such delays are sufficient in law to release the sureties from liability on the recognizance. (Citing cases).

"Bail bonds should be construed with reference to the laws of the sovereign jurisdiction where given, while the liability of principal and sureties is to be measured by the terms of the bond, the obligors, especially the sureties, have the right to expect and insist that the prosecution observe the mandates of the statutes * * *

"The record fails to show any good cause for the neglect on the part of the state, to file the information until October 9th, 1901, more than three months after the expiration of the time limited. If the state can omit the performance of so important a duty for three months, why may it not do so for six months, or for an indefinite period, and in the meantime insist upon the forfeiture of defendant's recognizance? We cannot conceive this to be the law. True, the surety may seize the person of their principal and surrender him into the custody of the law, and thus exempt themselves from further liability. Still, we think that they should not be mulcted simply because they omitted to do so, having acted on the presumption that the prosecution would discharge its duties as required by the statute, or that otherwise it had elected to abandon such prosecution."

In the case at bar, the bond was given February 27th, 1925, the information was not filed until September 30th, 1926. Consequently, the bail should be discharged under the statutes cited.

The defendant was not called for trial, if at all, until January 3rd, 1927, nearly two years after being admitted to bail, and more than sixty days after the filing of the information. Under the statutes quoted, the bail should be discharged.

If the defendant and his surety can be held for nearly two years, there is no limit to their liability. Such a proposition is unreasonable.

Decisions of the state courts, construing state statutes, are binding rules of decision for the federal court. *Rev. Stat.* 721 *Comp. Stat.* 1538.

The holding of *State v. Lewis, supra* was affirmed in *State v. Caruso,* 137 Wash. 519, at p. 529, 243 Pac. 529, and the court again held that these statutes are mandatory.

VI.

The Forfeiture Was Premature

It was alleged in the answer (Tr. 11) and proved (Tr. 23) that the action was set for trial on several

dates after January 3rd, the alleged date of the forfeiture. Certainly the bail should not be forfeited where the case is set for trial at a time subsequent to the date of the forfeiture.

VII.

The Bond Was Void For Failure to Designate Any Crime. (*Sixth Affirmative Defense*)

The bond required the defendant to appear "to answer the charge of having on or about the .... day of ..... A.D. 192.., within said district, in violation of section .... of the ..... (Act of ....) (Criminal Cade) (R.S.) of the United States, unlawfully violating the National Prohibition Act."

It is true that the offense need not be set out in any technical terms, but it must sufficiently describe it so as to inform the defendant and his surety what he is held to answer. This is particularly true when the information has not been filed at the time the bond is given.

Here the charge is simply violating the National Prohibition Act. This might be any one of a large number of crimes ranging from a felony (conspiracy) to a misdemeanor, and might be within any time covered by the statute of limitations. No time or

place is mentioned in the bond. The bond was, therefore, insufficient.

In 6 C. J. p. 1000, it is said:

> "Where the offense is not a crime eo nomine, or, in other words, has no specific name, charging by name is insufficient, but its essential elements must be specified and set out."

VIII.

The Sureties Were Relieved Because the Information Charges a Different Crime Than That Set Forth in the Bond

If the bond describes any offense, it must relate to a single offense. Yet, the information (Tr. 28) charges the defendant in separate counts of *two* separate and distinct crimes.

This surety did not contract to produce the defendant for any and all offense which the government might desire to prosecute him for. The defendant might well appear to answer one crime, but not two or three or six charges. The risk of the surety being enlarged and increased, he is discharged.

6 C. J. 1001-2, 1029;

Dillingham v. U. S., 7 Fed. Cas. p. 708, No. 3913;

In 6 C. J., p. 1001, it is said:

> "In the absence of statute otherwise, where the offense stated in the bail bond or recognizance is different from that with which the accused stands charged, it will invalidate the undertaking, unless the variance is an immaterial one."

So, also, at p. 1002, it is said:

> "If the variance (between the bond and information) is a substantial one, and the bond or recognizance names or describes a different offense than that charged in the indictment, although it describes one of the same general class or nature, the sureties will not be bound."

SUMMARY

We respectfully submit that the judgment should be reversed and the cause remanded with instructions to dismiss the action, because:

(1) The bond proved was executed and dated at a different time than the bond alleged;

(2) The bond proved is conditioned different than the bond alleged:

a. The bond alleged is for appearance during the May 1926 term; the bond proved was for appearance in the November 1924 term;

b. The bond proved is a "time to time" bond; the bond alleged was a "term to term" bond;

(3) There was no proof whatsoever that the defendant was called;

(4) There was no proof whatsoever that the defendant "came not," if actually called;

(5) There was no proof whatsoever that the surety was called to produce the defendant;

(6) There was no proof whatsoever of the judgment nisi;

(7) There was a material unauthorized alteration of the bond after execution;

(8) The bond is void because no time is stated for appearance of the defendant;

(9) The surety is discharged because the defendant was not called, nor was any information filed until five terms after the date set for appearance;

(10) The bond was void for failure to designate any crime;

(11) If the bond charges any crime, the sureties are relieved because the information charges a different crime than set forth in the bond.

Respectfully submitted,

CALDWELL & LYCETTE,

Attorneys for Appellant.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

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Appellant.

vs.

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HONORABLE EDWARD E. CUSHMAN, JUDGE

Brief of Appellee

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Brief of Appellee

STATEMENT OF THE CASE

The statement of the case as set forth in appellant's brief is substantially correct. Eugene Rogers was charged in the United States District Court for the Western District of Washington, Northern Division, with violation of the National Prohibition Act, and

upon his failure to appear for trial, his bail bond was forfeited. The National Surety Company was surety on said bail bond. Judgment *nisi* was entered. This matter came before the trial Court for trial after the issues were joined on the writ of *scire facias* and the answer in this case. The trial Judge granted judgment for the plaintiff. (Tr. 13.)

ARGUMENT

I.

Appellant's citations stating in substance that *scire facias* on a bail bond is the commencement of a new or original civil suit or action are correct. Appellant is also correct in stating that the pleadings are governed by the state procedure. On page 15 of the brief appellant begins his argument in main by stating that there was a variance between the writ and the bond. The writ was amended during the trial in the lower Court to conform with the bond. (Tr. 21.) This was over the objection of appellant. After the amendment the variance was cured inasmuch as said amendment was allowed. It is the position of the Government in this case that the variance is not cured by amendment was immaterial and of no consequence and therefore, not fatal.

See 6 C. J. (p. 1070), wherein it is stated that a variance that could not have surprised or prejudiced the adverse party will not be regarded as material. In note 13 on said page the following examples are given as being cases within the general principle stated in the text where variance has not been held not to be fatal:

(1) As to the offense charged. (*Whitfield vs. State,* 4 Ark. 171, and cases cited.)

(2) As to appearance. (*Sheets vs. People*, 63 Ill. 78.)

(3) As to the Court. (*State vs. Edminister*, 75 Atlantic 57.)

(4) As to the date of recognizance. (*Camp vs. State*, 45 S. W. 491.)

However, it is not necessary to go into the question of whether or not the variance was fatal any further, on account of the fact that it was within the discretion of the trial Court to allow a trial amendment of the writ in this case. (6 C. J. p. 1066.)

In the case of *Marks vs. Smith* (60 S. E. 1016) it was held that an amendment of a rule *nisi* issued on forfeiture of a bond in a criminal case changing the recital of the date of the execution of the bond so as to make

such recital of the date correspond to the true date of the bond does not add a new cause of action and is properly allowed. To the same effect are *McCrary vs. Willis* (35 Wash. 676); *Standard Furniture Company vs. Anderson* (38 Wash. 582) and *Land Company of*

II.

Florida vs. Fetty (15 Fed. (2nd) 942).

On page 17 of appellant's brief, he contends that the bond proved is conditioned different than the bond alleged. It is the Government's contention in answer to this statement that the words "term to term" which appellant contends were added and forged to the bond in the case at bar are surplusage and are absolutely immaterial and irrelevant, and unnecessary so far as the Government's right to have the bond forfeited in this case.

In *U. S. vs. Duke,* 5 Fed. (2nd) 825, it is held that a surety on a bond conditioned that defendant appear at a term of Court to be begun and held on the 1st day of February, 1924, was liable on defendant's failure to appear at the May term although there was no term in February, in view of Remington's Comp. Stat. of the State of Washington (Sec. 1957), which became a part

of the bond and required that defendant appear to answer the charges against him at all times until discharged according to law. The Duke case is a case decided by Judge Neterer, sitting as District Judge in the Western District of Washington, Northern Division. The Court stated that a Washington statute which required defendant to appear whenever the case was prosecuted and to be ever present until discharged became a part of the bond.

Therefore, even if the words "term to term" were left out of the bond in the case at bar it would appear that the validity of the bond in this case would not be altered. Section 1957, Remington's Comp. Stat. of Washington, which statute is mentioned in the *Duke* case, read as follows:

> "The recognizance shall be conditioned in effect that the defendant will appear to answer said charge whenever the same shall be prosecuted, and at all times until discharged according to law, render himself amenable to the orders and process of the Superior Court, and if convicted, render himself in execution of the judgment."

A bond is not invalid on account of additions to the same which are surplusage. (6 C. J. 995).

III.

On page 18 of appellant's brief, it is contended that the defendant was not duly proven to have been called and defaulted. In the *Rundlett* case, cited on page 19 of appellant's brief, it is stated that only the principal, need necessarily be called and that only the principal's default be necessarily entered of record. This statement is brought to the Court's attention on account of the fact that later on in appellant's brief it will be found that it is contended by appellant that it is necessary to prove the calling and default of the surety as well as the principal. This is not the law.

In the case at bar the judgment nisi was properly proven. The following was read into the record at the instance of the Government: Line 1—September 30, 1926, Filed information. Line 2—January 3, 1927, Entered order forfeiting bail and for bench warrant. Certainly it cannot reasonably be contended that after an order forfeiting defendant's bail and directing the issuance of a bench warrant is proven that the defendant cannot be said to have defaulted. In *Commonwealth vs. Fogel* (3 Penn. Super. 566), it was held that the calling of the accused will be presumed from a record entry of forfeiture. The record of a forfeiture

of a recognizance is conclusive evidence of the breach and cannot be impeached by extrinsic evidence. (6 C. J. 1071).

The entry of the forfeiture stands for proof of all the steps necessary to complete the forfeiture including the fact that the bail and defendant were duly called and did not appear and answer. (*Fox vs. Com.* 81 Pa. 511.) It has also been held that an entry "recognizance forfeited" is conclusive that defendant and the bail were called and did not appear." See *Com. vs. Basendorf* (25 A. 779).

The above cited cases bear out the Government's contention in this case that no error was committed by the trial Court even though the record does not show the defendant was called prior to the forfeiture on account of the fact that the judgment nisi was properly proved and the proper taking of all antecedent steps will after the judgment nisi, has been proven, be presumed.

In *Burrall vs. People*, (103 Illinois App. 81) it was held that the recognizance of record and the judgment of forfeiture are *competent* and *sufficient* evidence, under appropriate averments in scire facias to authorize judgment of execution according to the form, force and effect of the recognizance.

It is desired at this time to call to the Court's attention two statutes of the State of Washingon dealing with the forfeiture of bail. The statutes are set forth herein as follows: Remington's Compiled Statutes of Washington, 1915, Section 777—

> "Bonds are not to Fail for Want of Form—No bond required by law, and intended as such bond, shall be void for want of form or substance, recital, or condition; nor shall the principal or surety on such account be discharged, but all the parties thereto shall be held and bound to the full extent contemplated by the law requiring the same, to the amount specified in such bond. In all actions on such defective bond, the plaintiff may state its legal effect in the same manner as though it were a perfect bond."

This statute in substance provides that minor defects shall not invalidate bail bonds. Section 2235 Remington's 1915 Compiled Statutes of the State of Washington is as follows:

> "Action on Recognizance not to be Barred, etc. —No action brought on any recognizance given in any criminal proceeding whatever shall be barred or defeated, nor shall judgment be arrested thereon, by reason of any neglect or omission to note or record the default of any principal or surety at the time when such default shall happen, or by

> reason of any defect in the form of the recognizance, if it sufficiently appear, from the tenor thereof, at what court or before what justice the party or witness was bound to appear, and that the court or magistrate before whom it was taken was authorized by law to require and take such recognizance; and a recognizance may be recorded after execution awarded."

It will be seen that the above statute states in substance that no forfeiture or action on a recognizance shall be barred by reason of any neglect to note default of the principal. It is believed that these statutes are controlling in this case, and that the mere failure to note default by defendant in a bond forfeiture case in the Federal Court will not bar recovery by the United States, and also that minor defects in bonds must be disregarded in bond forfeiture proceedings in the Federal Courts located within the State of Washington.

IV.

On page 21 of appellant's brief it is contended that there was no proof whatsoever of judgment nisi. Tr. page 22, the following will be found—"January 3, 1927,—Entered order forfeiting bail and for bench warrant," which shows that judgment nisi was properly proven. It is contended, however, by appellant

that judgment nisi is not sufficiently pleaded with sufficient particularity as is required by law. It is contended that it is insufficient as it neither states the person, amount of bond or condition. In *Southern Surety Company vs. United States,* 23 Fed. (2nd) 55, the Court stated:

> "The eighth objection is that 'the Court erred in holding that the suit could be maintained, though the only forfeiture ever ordered was not against this defendant, but against Salinger.' This objection rests upon the overruling of a demurrer to the complaint (1) because it was nowhere alleged there that the bond declared therein had ever been forfeited as against the defendant, nor that any proceedings had ever been had or taken declaring the bond or bonds forfeited as against the surety company, or any proceeding declaring such forfeiture had ever been had; and (2) because the same point was raised in the motion for a new trial. But the denial of a motion for a new trial, or of any motion or claim made therein to sustain the motion for a new trial, is not reviewable in a federal appellate court, and in our opinion the averments in the complaint stated a clear and good cause of action against the surety in this case, without the allegations of whose absence counsel here complain."

From the above it may well be inferred that it is not

necessary to plead or prove any forfeiture as to defendant, who is a surety on the bond.

In *People vs. Tidmarsh* (113 Ill. App. 153), an order as follows:

> " * * * and now it is by the Court ordered that recognizance herein be and is now forfeited."

was held a sufficient formal declaration of a forfeiture.

To the same effect is the case of *Banta vs. People* (53 Ill. 434). In *State vs. Eyerman* (72 S. W. 539) it was held that it was not necessary that an order declaring a forfeiture of a recognizance state the amount of the forfeiture, especially in view of an Illinois statute which provided that a proceeding on a recognizance shall not be defeated on account of any defect of form or other irregularity. The Illinois statute mentioned herein, it will be seen, is very similar to Remington's Comp. Stat. 1915, Section 777, already mentioned herein. In the case of *Banta vs. People, Supra*, the following order of forfeiture was held sufficient and proper:

> "It is therefore, considered by the Court that the recognizance of the said defendant be and is hereby declared to be forfeited, and that default of said defendant and of his securities be entered of

record and that scire facias issue herein against the said Jonathan Way and Jordan Banta and Tillman Lane returnable to the next term of this Court, requiring the said defendant and his securities then and there to appear and show cause why the people should not have judgment and execution upon their said recognizance according to the form, force and effect thereof."

V.

It is contended on page 21 of appellant's brief that no proof was introduced that the surety was called to produce the defendant. The Government contends that no such proof was necessary. The *Rundlett* case, cited on page 19 of appellant's brief, so states by inference. To support his contention that the surety should be called to produce the defendant, appellant cites a portion of 3 Ruling Case Law at page 62. This citation, however, it will be noted deals with obligations which are in form and substance several only. It will be seen, however, by reference to the bond in the case at bar (Tr. 26) that the obligation or bail bond in this case was a joint and several obligation, and not a several obligation only. Therefore, appellant's quotation from 3 R. C. L., page 62, which quotation is on page 21 of appellant's brief, is not in point.

In *Southern Surety Company vs. United States, Supra,* it was held—it is unnecessary even to allege that the bond had been forfeited as against the defendant's surety. With reference to this point, we find the following pertinent statement in 6 C. J., 1046, which we deem to be the law—

> "It has been held that if there has been default on the part of the principal he is the only one to be called or notified and that a forfeiture of the recognizance may be declared or entered without calling the sureties and without previous notice to them unless such notice is required by statute. It has also been held that no notice need be given the surety to produce the principal on the day the bail is forfeited."

VI.

On page 24 of appellant's brief, he begins arguing on the point that there was a material, unauthorized alteration on the bond after its execution, which rendered it void. In answer to this the Government calls the Court's attention to the case of *U. S. vs. Duke, Supra,* which holds the words from "term to term" are unnecessary in cases in which the facts are similar to the case at bar. In the *Duke* case the Court points out that the Washington statute requires the defendant to appear at all times, not only during the term, but at all times dur-

ing subsequent terms. In the case of *U. S. vs. Fletcher*, 279 U. S. 163, it was held that a bail bond which required the defendant to appear from time to time means just the same as if the term to term was specified. In the *Fletcher* case the bond was conditioned that the defendant appear instanter and from time to time thereafter to which the case might be continued, and it was held said bond required defendant's appearance from day to day and from term to term until his case was disposed of whether or not there was a formal continuance; and to authorize the forfeiture of the bond at any time for the non-appearance of the main defendant. In view of the *Duke* case and the *Fletcher* case, it would seem that an addition to the bond in the case at bar of the words "from term to term" was an immaterial alteration—. An immaterial alteration does not in any way vary or change the legal effect of the instrument and does not render it invalid. 6 C. J. 1026.

VII

On page 27 of appellant's brief it is stated that the bond is void because no time is stated for appearance. In *U. S. vs. Duke, Supra*, no definite time or date was stated for the appearance of the defendant but the Court held that the Washington statute which provided

the defendant should appear at all times until discharged, governed, and automatically became a portion of the bail bond. In the *Duke* case the bond was conditioned "to appear during the first day of the term." In the present case the bond is conditioned for the appearance of the defendant during the 1925 term. The Washington statute automatically becomes a portion of the bond and requires defendant's appearance at all times.

In the case of *Whittaker v. U. S. F. & G. Co.*, see 300 Fed. 130, it was held that an indemnified surety on a stay bond on affirmative of judgment was liable for the amount of the judgment though the bond because of mistake or fraud on the part of the principal did not so provide, since such surety had constructive if not actual knowledge of the conditions intended by the Court and parties, and such condition was implied.

In the case of *People vs. Richardson*, 187 Ill. App. 634, it was held that where a bail bond was given on October 15, 1912, requiring the appearance of the accused at the next term of Court to be held on June 6, 1912, instead of 1913, the mistake did not render the bond a nullity; and it was held also that the parties were bound to know at their peril what was the first day

of the next term of Court. In view of the above cases, the Government's contention that the sureties were bound to know on what day they were bound to appear and that they were held at all times to appear, and that any mistake in the bond such as the one claimed was immaterial; seems correct. It must also be borne in mind that Remington's Compiled Statutes, Section 777, provides that bonds are not too fail for want of form.

The case of *Joelson vs. U. S.*, 28 Fed. 106, is cited by appellant in substantiation of his contention with reference to this point. The Joelson case is analyzed and distinguished in the Court's opinion in the case of *U. S. vs. Duke, Supra*, in which the Court said that the *Joelson* case is not parallel on account of the fact that a different state statute governed in the *Joelson* case on account of the bond being executed in another state.

VIII

On page 29 of appellant's brief he states that the defendant was not called at any time covered by the bond. This contention is answered by our citations with reference to the last point raised by appellant and considered in his brief. Obviously under the Washington statute the defendant was bound to appear at all times until discharged.

The case of *U. S. vs. Mace*, 281 Fed. 635, as pointed out in the case of *Duke vs. United States*, *Supra*, is not in point on account of the fact the bond in the Mace case was executed in another state. The Washington statute could not possibly be held to be controlling there. So with the case of *U. S. vs. Keiver*, 56 Fed. 422, in which case the bond was executed and filed in Federal Court in the state of Wisconsin, and the Wisconsin statute must be held to be controlling in that instance with reference to the interpretations of the conditions and the obligation of the bond.

In the case of *U. S. vs. Davenport*, 266 Fed. 425, the Court stated:

> "There seems no reason for a strict or highly technical construction of law in favor of defendants. This action does not involve the guilt or innocence, conviction or acquittal of any-one. It is not a criminal case. Upon the failure of the principal to appear the sureties became debtors."

U. S. vs. Sanges, 144 U. S. 310, 36 L. Ed. 445;

U. S. vs. Zarafonitis, 150 Fed. 97, 80 C. C. A. 51.

In *United States vs. Fletcher*, *Supra*, it was held that a bail bond was valid and required the defendant to appear at all times until discharged even though it was

not conditioned for the appearance of the defendant from term to term, but was merely conditioned for his appearance from time to time. In view of the above decisions it is claimed on behalf of the Government that there is no merit in the contention that the defendant was not called at any time covered by the bond.

IX.

On page 34 of appellant's brief it is contended that the bail is discharged under the law and under the Washington statutes. Remington's Compiled Statutes, Wash. 1922, section 2311, reads as follows:

> "Whenever a person has been held to answer to any criminal charge, if an indictment be not found or information filed against him within thirty days, the court shall order the prosecution to be dismissed, unless good cause to the contrary be shown."

Also section 2312:

> "If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown."

Appellant contends that inasmuch as the charge against defendant in the case at bar was not filed within thirty days after his arrest that the bail is automatically discharged. According to section 2311 of Remington's Comp. Stat. this would be true if the principal in a criminal case was dismissed.

Appellant also relies upon Remington's Comp. Stat. 1922, section 2312, which provides that if defendant be not brought to trial within sixty days after the charge is filed against him the Court shall order it to be dismissed. Appellant contends that section 2312 inures to the benefit of the surety in the case at bar inasmuch as defendant in the case at bar was not tried within sixty days after the information was filed against him.

Assuming for the purpose of argument, but not conceding that these statutes inure to the benefit of the surety they are not applicable in the case at bar. In the case at bar the Court did not at any time dismiss the information for want of prosecution.

In the cases of *State vs. Lewis*, 35 Wash. 261, and *State vs. Caruso*, 137 Wash. 519, cited by counsel for appellant on page 35 of his brief, the informations or charges filed against defendant were dismissed by the Court. It is the Government's contention, however,

that the surety cannot possibly be discharged from his obligation upon the bond until the principal is dismissed from the information or indictment in the case.

Section 2313 Remington's Comp. Stat. of the state of Washington, 1922, provides as follows:

> "Whenever the Court shall direct any criminal prosecution to be dismissed the defendant shall if in custody be discharged therefrom or if admitted to bail his bail shall be exonerated, and if money has been deposited instead of bail it shall be refunded to the person depositing same."

In view of the foregoing statute it would seem the bail cannot be exonerated without the dismissal of the charge against the defendant. Section 1957 Remington's Comp. Stat. of the state of Washington, 1922, states in substance that the recognizance shall be in effect at all times until the discharge of the defendant according to law. It is a general rule of laws announced by the decisions of Federal Courts that a forfeiture of a bail bond in a criminal action is not barred on account of the fact that prosecution of the criminal action is barred by the Statute of Limitations. *U. S. vs. Davenport*, 266 Fed. 427. *U. S. vs. Dunbar*, 83 Fed. 151. On page 154 of the *Dunbar* case, the Court said—"whether the offenses with which William Dunbar was

charged were barred by lack of time could only be determined in the prosecutions against him. The undertaking of the sureties was to answer for his appearance. That obligation did not at all depend upon or involve the question whether the prosecution of the respective offenses was barred by lapse of time."

X.

On page 38 of appellant's brief it is contended the forfeiture was premature in that the action was set for trial after the date of the forfeiture of the bail bond. There is no merit whatsoever in this contention. See *Southern Surety Co. vs. United States*, 23 Fed. (2nd) 55, which holds that it is no defense for the surety that a trial date was set after the forfeiture of the bond. To the same effect is *Kirk vs. U. S.*, 131 Fed. 338, which was affirmed in the United States Supreme Court in 51 L. Ed. 671.

XI.

On page 39 of appellant's brief, it is contended that the bond was void for failure to designate any crime. It appears that there is also no merit in this contention. It will be seen that the bond in question is conditioned for the defendant to answer the charge of violation of

the National Prohibition Act. In *Moran vs. U. S.*, 10 Fed. (2nd) 455, it was held that a bail bond reciting a violation of a Federal statute is sufficiently definite with reference to the description of the offense to bind the sureties.

In the case of *State vs. Reames*, 66 Southern 393, it was held an incorrect or insufficient description of the offense in an appearance bond does not relieve the sureties as they are held to know that they are putting up bond for the appearance of the defendant for trial for an offense at the next term of Court. In *Territory vs. Conner*, 87 Pacific 591, it was held that in a bail bond it is not required that all the facts necessary to be stated in the indictment should be set forth with legal accuracy or in the terms of the statute, but it is sufficient if it shows that the defendant was charged with the commission of a public offense.

With reference to the contention of appellant that the bail bond is void for insufficient description of the offense, Section 777 of Remington's Comp. Stat., Wash. 1922, should also be borne in mind by the Court. This section as heretofore pointed out herein, prescribes that no bond shall fail for want of form.

XII.

On page 40 of appellant's brief, he contends that the

sureties were relieved because the information charges a different crime than that set forth in the bond. Bail bonds are often given before the indictment or information is filed and therefore, it is not necessary to have the information or indictment conform in every detail as to the description of the offense in the bond. *Wells vs. Terrell,* (Go.) 49 S. E. 319. The fact that the description of the offense in the bail bond or recognizance varies from that set forth in the information or indictment will not avoid the undertaking if it in substance discloses the offense charged.

At 6 C. J. 1002, it is stated—

> "Where the offenses are different degrees of the same class as where the indictment is for an offense of a higher grade than that described in the undertaking and includes the latter offense or arose out of the same act or transaction the bail are not released."

In the case at bar, it will be seen that the offense charged in the information and the offense set forth in the bond are violations of the same statute and arise out of the same transaction.

It is contended by the Government, however, that appellant cannot now question in the appellate Court insufficiency of the evidence in the trial Court to sustain

a judgment for the plaintiff on account of the fact that after appellant moved for a non-suit and excepted to the Court's denial of the same, appellant's counsel introduced defense testimony and failed to renew its motion for dismissal at the end of the entire case. Under the decisions as announced by the Federal Courts in all the Circuits, appellant has by his failure to renew his motion at the end of the case waived his right to have the upper Court consider the insufficiency of the evidence to sustain the judgment below.

American R. R. Co. of Porto Rico vs. Santiago et al, 9 Fed. (2nd) 753;

Bunker Hill & Sullivan Mining and Concentrating Co. vs. Polak, 7 Fed. (2nd) 583;

Columbia & Puget Sound R. R. Co. vs. Hawthorne, 144 U. S. 202, 36 L. E. D. 405;

Gilson vs. F. S. Royster Guano Co., 1 Fed. (2nd) 82.

It is also contended that appellant did not properly except to the judgment in this case, which judgment had included in it various findings made by the Court.

It will be remembered that this was a non-jury trial, and it is contended by the Government that the findings

in the judgment should have been separately excepted to by the appellant in order to properly preserve his record on appeal.

In view of all the foregoing, it is respectfully submitted that the judgment of the lower Court should be affirmed.

Respectfully submitted,

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5498

NATIONAL SURETY COMPANY, a corporation,
Appellant.

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Appellant's Reply Brief

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Appellant's Reply Brief

I.

At p. 4 of its brief the Government attempts to meet the point made by appellant, at p. 17 of its opening brief, that, "The bond proved is conditioned differently than the bond alleged."

The Government's argument is that the unauthorized addition of the words "term to term" and "present term," is immaterial and therefore the variance is immaterial.

The Government has mistaken the point made here. The argument here advanced is not in relation to the words "term to term," but was that the writ alleges that the bond is conditioned for appearance "during the *May,* 1926, term, and time to time thereafter." The bond offered (Tr. 26) is for appearance "on the ..... day of the present term, 1925," and is dated February 27th, 1925. The "present term" would therefore be the November, 1924, term.

Our point is that it is a fatal variance to allege a bond for appearance in May, 1926, and to prove a bond for appearance in November, 1924. This is too great a discrepancy in time.

No amendment was asked to change this variance.

II.

The Government offers no answer to the point made by us at p. 17, that the bond was to answer "a charge *exhibited* against the said defendant," whereas no charge had been "exhibited."

III.

At p. 6 the Government attempts to answer the point made that there was no proof that "the defend-

ant was duly called but came not." The Government contends (p. 6) that reading into evidence lines from the clerk's docket (Tr. 22) "entered order forfeiting bail and for bench warrant," is sufficient proof (1) that the defendant was called, and (2) that the defendant failed to appear.

(a) The docket entry itself is not proof of anything. The *clerk's minutes* might be, but not the docket.

(b) To support its contention that the judgment of forfeiture is conclusive and cannot be impeached, the Government cites several old and isolated decisions of *inferior* courts. *But* wholly refuses to comment upon the *Federal cases* cited in the opening brief, holding squarely that proof of the calling of the defendant, and his failure to appear is most essential and must be made. Many other cases of high state courts were cited by appellant, but ignored by the Government.

REASONS FOR THE RULE—ABSURD RESULT OF GOVERNMENT'S CONTENTION:

1. The Government vigorously contends that it is not necessary to call the surety or give it any notice whatosever of the forfeiture, *and* that the defendant may be called at any time—even several years after the date of the bond (as here); *and,* that the *ex parte*

forfeiture made and entered is then binding and conclusive and cannot be impeached.

If this were true, then we would have the absurd result that the Government could go in at any time, on *ex parte* motion, and without notice to a surety, and have a minute entry of forfeiture made, which would be conclusive forever against the surety.

What if the defendant was never in fact called? What if defendant was called before the date for his appearance? What if defendant actually appeared and by mistake the entry was made? What if defendant appeared a few minutes after the forfeiture entry was made, and pleaded guilty and was sentenced?

Can it rationally be contended that the minute entry in such cases is conclusive and proves itself?

Clearly, if the surety has no right to be called and protest the entry of a forfeiture *nisi*—then it cannot be binding and conclusive against him.

The Federal cases cited in appellant's brief are squarely against this absurd proposition.

(c) *Foundation of the rule—rule not here applicable*:

The rule that the judgment imports absolute verity, if at all applicable here, is based upon the proposition prohibiting collateral attack. In such cases a judg-

ment must be produced which shows on its face by proper recital that the court had jurisdiction, and which shows the jurisdictional facts upon which it is founded.

But here there is no recital that the defendant was called, nor that he failed to appear. If these facts were recited it might be that the judgment *nisi* would be conclusive.

(d) This minute entry does not rise to the dignity of a judgment. It is only a minute entry. The rule of absolute verity was never intended to apply to minute entries.

(e) At pages 8 and 9 the Government cites two Washington statutes which provide that the bond shall not fail for want of form. From this the Government concludes that *proof of default* in an action on the bond is not necessary. This is a *non sequitur*. A statute providing that the bond shall not fail for want of form or recitals, does not obviate nor affirmatively furnish proof of a default.

IV.

At pp. 9-12 the Government attempts to avoid the point made by appellant (pp. 21-24) that there was no proof of the judgment.

The case of *Southern Surety v. U. S.*, 23 Fed. 2nd. 55, cited by the Government, is utterly foreign to the

subject. The Government refuses to comment upon the Federal cases cited by appellant, holding that this minute entry is insufficient.

Moreover, there was no judgment properly proved. The Government read from the docket the entry "entered order forfeiting bail and for bench warrant." The clerk's minutes, not the docket entry, is the only competent proof.

In the Federal cases cited by appellant it was held that the Government must produce the "records and files and the facts in question cannot be otherwise proven."

V.

At p. 12 the Government contends that it was not necessary to call the surety to produce the defendant, and cites *Southern Surety Co. v. U. S.,* 23 Fed. 2nd. 55. But in that case the point was not raised, because, as stated at p. 57, the court states that the surety was there in fact called.

VI.

At pp. 13 and 14 the Government attempts to meet our point that there was a material unauthorized alteration of the bond, after execution.

The Government does not deny that this unauthorized alteration (described pp. 24-27 of opening

brief) was made. They contend, however, that the addition of the words "term to term" and "present term" are not material. In view of the many Federal cases cited (pp. 30-31 opening brief) to the effect that these words are material and essential, it can not be held that they are not material. If such an array of authority can be produced to show their vital effect on a bond, they must be material. They may not be controlling, but they were material.

It cannot be said that one may alter a formal written instrument and then hold the other party to abide by a very close question as to the legal effect of the words added to the instrument.

VII.

At pp. 14 to 16 the Government attempts to answer our point (p. 27) that "the bond is void because no time is stated for appearance." The bond here, before alteration, fixed no time for appearance. It was conditioned for appearance on the ..... day of the ..... term of the Court to be held in Seattle on the ..... of 1925.

The case of *U. S. v. Duke,* 5 Fed. 2nd, decided by Judge Neterer, is cited as controlling. In that case, however, it will be found that the bond fixed a day certain (see bond p. 825, where it is stated "the 1st

day of February, 1924"). The bond in the *Duke* case did not mention the term, but did mention the day. There was, thus, a day certain fixed. But here there was no day, no month, or term—nor anything from which they could be determined. In the *Duke* case, the day being fixed, the term follows as a matter of law.

VIII.

At pp. 16 and 17 the Government attempts to answer our point (pp. 29-34) that "the defendant was not called at any time covered by the bond."

It will be remembered that the defendant was not called until nearly two years after the giving of the bond. If the bond covered any time it was the "present term, 1925." The bond being dated February 27, 1925, the present term would be the November, 1924, term.

The Government then makes the contention that "under the Washington statutes the defendant was bound to appear at all times until discharged." Here, we have advanced the bald proposition that the Government can wait any length of time to call the defendant. If two years, as in the instant case, then why not ten years? This is utterly unreasonable and can not be the law.

IX.

At pp. 18 and 19 the Government contends that the surety is bound under the Washington statutes, and that though these statutes require the information to be filed in thirty days (here the bond was given February, 1925, information filed September 30, 1926) and further require a prosecution in sixty days, that nevertheless the surety can be held.

In other words, the Government insists that the Washington statutes requiring the bond to cover appearance at any date, is controlling. *But* refuses to read in connection with that statute the related statute requiring the filing of a charge within thirty days and the prosecution in sixty days.

The Government would take advantage of the favorable statutes, but ignore the unfavorable.

It is only fair to assume that the broad Washington statutes governing time for appearance would never have been passed without the other statute, placing a limit upon the right to the prosecutor to indefinitely hold a defendant under a charge.

The Washington cases cited hold squarely that the thirty and sixty day statute inure to the benefit of the surety.

In *State v. Lewis,* 35 Wash. 261, 77 Pac. 198, it was said at p. 268:

> "When it shall have been determined that such right to discharge and dismissal exist in defendant's behalf, it would seem logically to follow that this right inures to the advantage of the sureties on the defendant's bail bond."

Counsel for the Government say that the Washington decisions cited are not controlling, because in each of them the criminal case was actually dismissed. But, they fail to observe that in *State v. Lewis,* which holds that the benefit of the thirty and sixty day statutes inure to the surety, the action on the forfeiture was made before the criminal case was in fact dismissed. The Supreme Court of Washington there held that even though the criminal charge had not been dismissed at the time the forfeiture was made, that nevertheless the surety could claim the benefit of the thirty and sixty day statutes.

X.

At p. 22 the Government attempts to meet our point (pp. 40-41) that "the sureties were relieved because the information charges a different crime than that set forth in the bond."

The Government, in its argument, overlooks and fails to meet the fact that if the bond covered any offense by any name, that nevertheless it did not require the surety to produce the defendant to answer *two* offenses such as were here brought against defend-

ant. It is not a question of similar offense, but a case of charging more than one offense.

XI.

Counsel for the Government contend that appellant has waived its right to have this court consider the insufficiency of the evidence to support the judgment, for the reason that appellant introduced evidence after its motion for a non-suit was denied and failed to renew its motion at the end of the case. In support of this contention are cited four cases:

American R. R. Co. of Porto Rico v. Santiego, 9 Fed. (2nd) 753;

Bunker Hill Mining etc. Co. v. Polak, 7 Fed. (2nd) 583;

Columbia and Puget Sound R. R. Co. v. Hawthorne, 144 U. S. 202;

Gilson v. F. S. Royster Guano Co., 1 Fed. (2nd) 82.

We admit that the general rule announced in these cases is applicable under certain circumstances. But we most urgently call the court's attention to the fact that this general rule is not an absolute and arbitrary one. It is subject to exception; and the case presented in this appeal falls clearly within all of these exceptions.

It might be well first to consider the reason for the general rule. The principles underlying it are

aptly stated in *Lancaster v. Foster,* 260 Fed. 5, at p. 6, as follows:

> "In behalf of the defendants in error it is contended that the first mentioned exception can not be availed of by the plaintiff in error because the latter thereafter introduced other evidence. A number of decisions are cited which indicate the existence of a rule to that effect. There is obviously good reason to support such a rule, where the record does not disclose the subsequently introduced evidence, or where that evidence is disclosed and it is such as to make the evidence as a whole enough to justify its submission to the jury. If the subsequently introduced evidence is not disclosed to the appellate court, it may be presumed that the plaintiff's case was strengthened by it, and that the evidence as a whole was such that an instruction to find for the defendant could not properly have been given. If any deficiency in the evidence offered by plaintiff is shown, or is to be presumed to have been supplied by the evidence offered by the defendant, the latter is in no position to complain of the court's refusal to direct a verdict in its favor. Such a position was presented in the case of *Grand Truck R. Co. v. Cummings,* 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 66. The bill of exceptions in that case did not show the evidence introduced by the defendant after the overruling of its motion, that a verdict in its favor be directed. It was held that under such circumstances it must be presumed that when the case was closed on both sides there was enough testimony to make it proper to leave the issues to be settled by the jury. There is no room for such a presumption where all the evidence adduced on both sides is contained in the bill of exceptions, and neither the part of it which was before the court when it refused to direct a ver-

dict for the defendant, nor all the evidence on both sides was enough to make it proper to leave the issues to be settled by the jury.

"The evidence introduced by the defendants in the instant case had no tendency to support the claim asserted by the plaintiff, or to supply any deficiency in the evidence offered by the latter. If it was error to overrule the motion for a directed verdict when it was first made, nothing afterwards occurred to cure that error. * * * * We do not think the rule invoked is applicable where it is affirmatively made to appear that there is an absence of any good reason for applying it."

It will be readily seen that a general rule based upon such a theory must necessarily have exceptions, and cannot be arbitrarily exercised in every case. The court has so decided. In fact, this court, in the case of *Alaska Fishermen's Packing Co. v. Chin Quong,* 202 Fed. 710, recognizes such an exception. In holding that in the particular case before the court the failure to renew was fatal, Judge Gilbert said, at p. 710:

"Error is assigned to the denial of the defendant's motion for a non-suit as to the first cause of action made at the close of the plaintiff's testimony. The assignment of error is of no avail to the defendant in this court, for the reason that, after the motion for a non-suit was overruled, the defendant proceeded to take testimony upon the issues involved in said cause of action, including evidence tending to show that plaintiff had not performed the contract, and did not, at the close of all the testimony, request the court to instruct the jury to return a verdict in its favor. *The case is unlike Lydia Cotton Mills v. Prairie Cot-*

> *ton Co.,* 156 Fed. 225, 8 CCA. 129, in which the court held that error might be assigned to the overruling of a motion for a non-suit made at the close of plaintiff's evidence, on the ground that there was no issue of fact for submission to the jury, notwithstanding that the defendant thereafter took testimony, and did not renew the motion at the conclusion of all the evidence. *In that case the motion was based solely upon a proposition of law, and no issue or question of fact was involved, and the defendant's evidence had, and could have, no bearing upon it."*

It is appellant's contention that this appeal comes squarely within this exception. Here there was no controverted question of fact for submission to a jury; there was nothing but a cold proposition of law, presented to the court. Furthermore, the defendant's evidence had, and could have, no bearing upon plaintiff's case. The complete record is before this court on review, from which it is clearly apparent that the evidence introduced by appellant could in no conceivable way bolster up plaintiff's case, the weakness of which remained precisely as it was before defendant's evidence was put in. No possible interpretation can be placed upon the record to warrant a finding that defendant at any time waived its motion for a nonsuit. Under these circumstances, then, the general rule does not apply.

A case directly in point on the contention we are making is *Citizens Trust & Savings Bank v. Falligan,*

4 Fed. (2nd) 481, heard in this court on April 6, 1925. Judge Gilbert, in accordance with his comment on the *Alaska Fishermen's* case, *supra,* discusses our point as follows:

> "The bank assigned error to the denial of its motion for a non-suit made at the close of the plaintiff's testimony. The ground of the motion was that there was no evidence to show that the bank participated in, or was a party to, the fraud. *The defendant in error contends that the bank waived its motion by its failure to request a peremptory instruction in its favor at the close of all the testimony. After the denial of the bank's motion, Barry testified in his own behalf; but the bank offered no further testimony and stood upon its motion.* The defendant in error cites cases holding that a motion for non-suit is waived where not renewed in a case where testimony is thereafter taken by the party so moving. In *Columbia Railroad Co. v. Hawthorne,* 144 U. S. 202, it was held that the refusal to direct a verdict for the defendant at the close of the plaintiff's evidence, when the defendant has not rested his case cannot be assigned as error. *It is true that the defendant bank in the present case at no time formally announced that it rested. But that circumstance is deemed of no importance. The controlling fact is that it did not waive its motion. Kinnear Mfg. Co. v. Carlisle,* 152 Fed. 933.
>
> "The question, therefore, is properly before us, whether or not there was evidence to go to the jury on the question of the bank's complicity in the fraud which was practiced upon the plaintiff."

It is to be noted that this opinion was in a case

tried to a jury. The case at bar presents a much stronger exception. Here was a clear proposition of law with no controverted question of fact, triable to the court, and the evidence defendant put in could in no wise affect plaintiff's case.

Another case squarely in point is *Lydia Cotton Mills v. Prairie Cotton Co.,* 156 Fed. 225. It is there stated, beginning at p. 233:

> "The testimony of the witnesses offered by the defendant in the case now under consideration in no way affects that offered by the plaintiff. * * * * We do not think that the rule of practice laid down in *Grand Trunk Ry. Co. v. Cummings,* and in *Insurance Co. v. Crandall,* above cited, applies in the case before us. The principle in our case is that there was no issue of fact for the jury at all, upon any of the evidence, or upon all of the evidence. The question was one solely for the court—the construction of a written contract, plain in its terms * * * *. The construction of the contract as set forth above in this opinion being for the court, there was no issue of fact for the jury. In all of the cases we have examined on the point we are now discussing, there was some evidence relating to the fact at issue, and the rule was laid down that if the defendant failed, after introducing testimony, to renew the motion to direct a verdict made at the close of plaintiff's case, the refusal of the trial court to grant the motion could not be assigned as error * * * *.
>
> "The motion of defendant was based solely upon a proposition of law, and no issue or question of fact was involved. We do not think, therefore, that any question in regard to the rule of practice referred to arises."

It is noted that in this case, as in the case at bar, "there was no issue of fact involved upon any of the evidence or upon all of the evidence. The question was one solely for the court—the construction of a written contract plain in its terms." It is to be noted further that this very case is the one referred to by Judge Gilbert in his opinion in the *Alaska Fishermen's* case, *supra,* as being an exception to the general rule.

The latest case in point is that of *American State Bank v. Mueller Grain Co.,* 15 Fed. (2nd) 899, in which it is said:

> "There was a motion for a directed verdict at the close of plaintiff's evidence. That, if not waived by subsequently calling the witness Steinert for the defendant, is available here. We are of opinion that it was not waived * * * *.
>
> "In *Grand Trunk Ry. Co. v. Cummings,* 106 U. S. 700, speaking of a motion made by defendant at the close of plaintiff's testimony, the court said: 'If he goes on with his defense and puts in testimony of his own, and the jury, under proper instructions, finds against him on the whole evidence, the judgment cannot be reversed, *in the absence of the defendant's testimony* on account of the original refusal, even though it would not have been wrong to give the instruction at the time it was asked.'
>
> "In *Lydia Cotton Mills v. Prairie Cotton Co.,* 156 Fed. 225, the court said: 'The reason for the principle laid down in the case last cited (*Grand Trunk*) is readily apparent, that, although the

testimony offered by plaintiff may not in itself have been sufficient to warrant a verdict, yet the court was entitled to see what effect the testimony of defendant subsequently offered may have had upon the issues involved. For, it frequently occurs in the trial of causes that the testimony of the defendant upon cross examination of witnesses, or disclosures otherwise made, has a tendency to strengthen rather than weaken plaintiff's case. It was, therefore, important that the defendant's testimony should be set out in the record, that the court might see and determine upon all of the testimony, as to whether or not the case should have gone to the jury.'

"The court held that the defendant might have assigned for error the overruling of a motion to dismiss, made at the close of plaintiff's evidence under the circumstances there shown. In *Lancaster v. Foster,* 260 Fed. 5, the court held that an exception to denial of the motion for a requested verdict made at the close of plaintiff's case, is not waived by defendant by subsequent introduction of evidence, where such evidence is all in the record, and contains nothing which strengthens plaintiff's case. Petition for certiorari was denied in that case."

These cases, and not the cases in appellee's brief, set forth the law applicable on this appeal. Each of the cases cited by counsel for the Government applies the general rule to a case falling within the scope of that rule—a case where there is an issue of fact, and not solely a proposition of law—a case where the defendant's evidence was not before the court on appeal—or a case where the evidence offered by defend-

ant affected plaintiff's case. Such cases are no authority for the case at bar.

We submit that defendant's motion for a non-suit was not waived; that there was no issuable question of fact involved; that the sole question was one of law; that with or without defendant's evidence it remained the same; that the question of the sufficiency of the evidence to sustain the judgment entered below is properly reviewable by this Honorable Court.

XI.

At p. 24 the Government contends that no proper exceptions were taken to the findings made by the court, and embodied in the judgment. An exception was taken to the judgment.

The assertion of this claim almost approaches bad faith on the part of the Government.

Neither counsel for the Government, nor for appellant, ever intended or attempted to have findings made. In drawing up the judgment the Government used a stock form, which contained certain recitals; but these were never intended as findings; nor do they comply with the rule of the court regarding findings.

The rule governing findings is as follows (Rule 62):

"In actions at law in which a jury has been waived as provided by the Act of Congress, it shall be in the discretion of the court to make special findings of fact upon the issues raised by the findings. Ordinarily the court will make such findings on request of either party, if such request be made on or before the submission of the cause for decision. Where such request is made and granted, no judgment shall be entered until the findings shall have been signed and filed or waived as hereinafter provided; but the rendition of the decision or opinion shall be deemed and considered, and shall be entered by the clerk, as merely a preliminary order for judgment. The counsel for the losing party shall prepare a draft of the findings, and shall serve such draft upon the opposite party within five days after receiving written notice of the decision, and shall thereupon deliver said draft to the clerk for the Judge, who shall as soon as practicable thereafter designate a time for the settlement of the findings, of which the clerk shall notify the parties. When such draft is presented to the Judge, the successful party may present such amendments or additions to the proposed findings as he may desire, and the whole shall be settled by the Judge.

"When the findings have been settled, they shall be engrossed by the losing party within five days after such settlement, and shall be signed and filed. If the losing party shall fail to serve his draft findings and deliver the same to the clerk as aforesaid within the time above specified, the right to special findings shall be deemed to have been waived, and the judgment may be entered without further proceedings upon the request of any party, or by the clerk without any such request. The periods above specified will not be extended.

> "Special findings may be of the ultimate facts in issue, as distinguished from conclusions of law on the one hand, and mere evidence on the other, and must cover all material issues raised by the pleadings."

This rule clearly contemplates a request for findings. No request can be found in the transcript.

The rule provides for separate findings which are to be "signed and filed" before the judgment is signed.

The *losing party* is to prepare the findings and the court is required to "designate a time for the settlement of the findings." The transcript shows no such proceeding; nor does it show "notice" to the parties of the time for settlement of the findings, as required.

As stated, the rule provides that the findings are to be prepared by the losing party, not the successful party. Further, the rule provides that if the losing party does not prepare findings, they are waived and none should be made.

Moreover, no rule is laid down as to exceptions to findings.

It will be found that in a number of the cases involving appeals on bail bonds, which will be argued at the same time as this case, the judgment recited that it was by default, whereas in fact the record shows that it was after full hearing. In other words, the judgments were prepared by the Government on stock

forms, without any thought of their constituting findings of fact.

We respectfully submit that the judgment should be reversed for the reasons set forth in the opening brief, which reasons are summarized at pp. 41-42 of the opening brief.

Respectfully submitted,

CALDWELL & LYCETTE,

Attorneys for Appellant.

No. 5500

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE P. CLARK, Trustee in Bankruptcy of the Estate of EDNA G. MILENS,

Appellant,

vs.

EDNA G. MILENS,

Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5500

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

In the District Court of the United States for the District of Oregon.

November Term, 1927.

BE IT REMEMBERED, That on the 21st day of November, 1927, there was duly filed in the District Court of the United States for the District of Oregon, a Referee's Certificate of Contempt for Failure to Obey Lawful Order, in words and figures as follows, to wit: [1*]

In the District Court of the United States for the District of Oregon.

No. 10,261.

In the Matter of EDNA G. MILENS, Doing Business as GUARANTEE SHOE STORE, Bankrupt.

REFEREE'S CERTIFICATE OF CONTEMPT FOR FAILURE TO OBEY LAWFUL ORDER.

To the United States District Court for the District of Oregon:

I, A. M. Cannon, one of the Referees in Bankruptcy of this Court, do report and certify that on the 22d day of July, 1927, I made an order requiring Edna G. Milens, the above-named bankrupt, to account for and pay over to George P. Clark, Trustee in Bankruptcy of the above-entitled bankrupt estate, on or before five days from the date of said

*Page-number appearing at the foot of page of original certified Transcript of Record.

order, the sum of $5,377.37 belonging to said estate and which amount was in her possession and under her control at said date, and which was at said time being fraudulently concealed from the said Trustee in Bankruptcy of the above-entitled bankrupt estate.

At the time of the entry of said order the said Edna G. Milens was present in person before me and also was represented by her counsel of record, James H. McMinnamen.

That said order was also personally served upon her by a copy thereof being delivered to her in person on the 23d day of July, 1927, as shown by the affidavit of service, on file with the records of this cause.

A copy of said order is filed herewith and made a part hereof and there is also attached hereto and made a part hereof my findings upon which the order so made by me on the 22d day of July, 1927, was based.

I further certify that the said Edna G. Milens has failed to comply with said order and that the time within which to comply with the same has now expired.

I further find that the said Edna G. Milens is in contempt of court for failure to obey said order and therefore recommend that she be punished for contempt and committed until she shall have paid to her said Trustee the sum of $5,377.37. [2]

All of which is respectfully submitted.

Dated this 24th day of August, 1927.

A. M. CANNON,

Referee in Bankruptcy. [3]

[Title of Court and Cause.]

ORDER REQUIRING EDNA G. MILENS TO TURN OVER TO HER TRUSTEE ASSETS UNACCOUNTED FOR TO SUCH TRUSTEE.

George P. Clark, the trustee herein, having applied to this Court for an order requiring the bankrupt herein to forthwith account for and pay over to the trustee the sum of $5,377.37 in cash belonging to said estate in bankruptcy and alleged by the trustee to be in the possession of the said bankrupt and to be concealed by her from her trustee, and an order to show cause having been issued out of this court based upon said petition and served upon the said Edna G. Milens, and hearing having been had upon said order on the 6th day of July, 1927, at which hearing said Edna G. Milens appeared in person and by her attorney and the Referee having heard the testimony in support of said petition and being fully advised, and a decision having been rendered thereon.

Now, on reading and filing the petition of George P. Clark, trustee in bankruptcy herein, and considered the testimony offered in support of said petition, and being fully advised,—

IT IS, UPON MOTION OF COAN & ROSENBERG, ATTORNEYS FOR TRUSTEE, ORDERED that the prayer of the trustee's petition herein be and the same is hereby granted and it is further ordered that Edna G. Milens, the above-

named bankrupt, account for and pay over within five days from the date of this order, to George P. Clark, trustee in bankruptcy of the estate of Edna G. Milens, bankrupt, the sum of $5,377.37 belonging to said estate and which amount this Court now finds is in her possession and under her control.

A. M. CANNON,
Referee.

Dated this 22d day of July, 1927. [4]

[Title of Court and Cause.]

FINDINGS OF REFEREE.

An order to show cause having been issued out of this court upon the petition of the trustee, which petition prayed that the bankrupt be required to show cause before this court why an order should not be made directing the bankrupt to forthwith deliver and pay over to George P. Clark, trustee in bankruptcy of this estate, the sum of Five Thousand Three Hundred and Seventy-seven Dollars and Thirty-seven Cents ($5.377.37), alleged to be intentionally and wilfully concealed by said bankrupt from the trustee, and an order to show cause having issued out of this court and having been served upon said bankrupt requiring her to appear before this court on the first day of July, 1927, at the hour of ten o'clock A. M. of said day, and the said bankrupt having appeared by and through her attorney and requested that said matter be continued until

the 6th day of July, 1927, at 9:30 A. M. and on said date, to wit, the 6th day of July, 1927, at the hour of 9:30 A. M., said bankrupt appearing in response to said order to show cause, in person and by and through her attorney, the trustee in bankruptcy having appeared at said time and place by and through his attorneys Coan & Rosenberg and testimony being thereupon offered and taken before this court, and the matter having been submitted to this court for a decision, the Referee does now make the following

FINDINGS OF FACTS.

I.

That the bankrupt, Edna G. Milens, during the year 1926, conducted a shoe-store in the City of Portland, Oregon, and that during said year she received in cash from the sale of merchandise in said [5] business the sum of $18,733.62. That out of said sum expenses of the business were paid amounting to the sum of $5,042.26 and merchandise accounts were paid amounting to the sum of $6,308.25. The Court further finds that during said year the bankrupt drew in checks in her own name for her personal use the sum of $2,005.74.

II.

The Referee further finds that the bankrupt drew in cash out of the moneys actually received in cash during the year 1926 the sum of $5,377.37, which sum was in addition to the amount of $2,005.74 drawn by the bankrupt by means of checks out of the business' bank account.

III.

The Referee further finds that in addition to the money drawn by the bankrupt both in checks and cash, the bankrupt's husband conducted the store and was paid a salary out of said business for his services.

IV.

The Referee further finds that of the sum of $5,377.37 withdrawn by the bankrupt from the business in cash, a large amount was drawn therefrom immediately preceding the adjudication in bankruptcy herein.

V.

The Referee further finds that the bankrupt, although given every opportunity to explain what has become of said money, has wholly failed to account for the use of said money or to give any plausible explanation as to the use thereof and the Referee finds that said sum of $5,377.37 was in the possession of the bankrupt at the date of the adjudication in bankruptcy herein and was and now *in* concealed by said bankrupt from *here* trustee in bankruptcy, George P. Clark.

VI.

The Referee further finds that the said bankrupt Edna G. Milens, now has in her possession said sum of $5,377.37, which she has failed and refused and still fails and refuses to account for or pay over to the trustee and which sum the Referee finds the bankrupt does now knowingly and fraudulently and wilfully conceal from her trustee in bankruptcy.

Dated this 22d day of July, 1927.

A. M. CANNON,
Referee. [6]

Filed November 21, 1927. [7]

AND AFTERWARDS, to wit, on the 17th day of March, 1928, there was duly filed in said court an order to show cause for contempt, in words and figures, as follows, to wit: [8

[Title of Court and Cause.]

RULE TO SHOW CAUSE WHY EDNA G. MILENS SHOULD NOT BE PUNISHED FOR CONTEMPT FOR FAILURE TO OBEY LAWFUL ORDER.

It appearing to this court that A. M. Cannon, Esquire, a Referee in Bankruptcy of this court, having filed in this court his certificate to which is attached a copy of a lawful order made by said Referee on the 22d day of July, 1927, after a hearing before said Referee at which hearing said Edna G. Milens, Bankrupt, was present in person and by her attorney and said order having been made in the presence of the said Edna G. Milens and her attorney, J. H. McMennamin, and thereafter a copy of said order having been personally served upon the said Edna G. Milens and there being also attached to said certificate a copy of said Referee's findings upon said hearing and the certificate of said Referee showing that the said Edna G. Milens

has failed to comply with said order so made by the Referee, and further that the time in which to comply therewith has now elapsed and expired, and it further appearing from the records of this court that on the 21st day of November, 1927, an order was entered in this court ordering the said Edna G. Milens to show cause before this court on Monday the 5th day of December, 1927, at ten o'clock A. M., why she should not be adjudged guilty of contempt of court for failure to comply with the lawful order of said Referee, which order of this court has not been served upon the said Edna G. Milens,—

NOW, THEREFORE, IT IS HEREBY ORDERED, that Edna G. Milens show cause before this court at the Federal Court House in the City of Portland, Oregon, on Monday, the 26th day of March, 1928, at ten o'clock A. M. of said day, or as soon thereafter as counsel can be heard, why she should not be adjudged guilty of contempt of court for failure to comply with the lawful order of said Referee. [9]

IT IS FURTHER ORDERED that service of a copy of this order together with a copy of the referee's certificate shall be sufficient service upon the said Edna G. Milens if made on or before the 20th day of March, 1928.

R. S. BEAN,
Judge.

Dated this 17th day of March, 1928.

Filed March 17, 1928. [10]

AND AFTERWARDS, to wit, on the 26th day of March, 1928, there was duly filed in said court an answer, in words and figures as follows, to wit: [11]

[Title of Court and Cause.]

ANSWER TO RULE TO SHOW CAUSE WHY EDNA G. MILENS SHOULD NOT BE PUNISHED FOR CONTEMPT FOR FAILURE TO OBEY LAWFUL ORDER.

Comes now Edna G. Milens, the bankrupt person above named, and for answer to said rule of court in said cause bearing date the 17th day of March, 1928, admits, denies and alleges, as follows:

I.

Said bankrupt herewith submits herself to the above-entitled court and throws herself wholly and completely upon the mercy of the Court.

II.

Said bankrupt, in answer to said rule to show cause, denies in the premises that she ever disobeyed any rule of the Court in the above-entitled cause.

III.

Said bankrupt admits that the Referee in Bankruptcy did, heretofore, make a referee's certificate of contempt for failure to obey lawful order of the Court.

IV.

Said bankrupt alleges that said alleged findings of fact do bear date the 22d day of July, 1927, and

sand bankrupt admits that she was present at a hearing before said Referee, whereat the matter of Five Thousand Three Hundred Seventy-Seven and 37/100 ($5,377.37) Dollars was a matter of contention before the said court. Said bankrupt alleges with reference thereto that she has no recollection of any order having been served upon her to pay over $5,377.37, and does not now recollect any order having been served upon her, requiring her to be and appear for any contempt orders, or with reference [12] to contempt matters, save and except, that certain order above noted, bearing date March 17th, 1928, requiring her to be and appear before the above-entitled court on Monday, the 26th day of March, 1928.

V.

Said bankrupt further alleges that she takes exception to and denies the correctness of the finding of fact herein, wherein said Referee in Bankruptcy, heretofore, in paragraphs IV, V, and VI, of his said findings of fact, found as follows:

IV.

"The Referee further finds that of the sum of $5,377.37 withdrawn by the bankrupt from the business in cash, a large amount was drawn therefrom immediate preceding the adjudication in bankruptcy herein.

V.

The Referee further finds that the bankrupt, although given every opportunity to explain what has become of said money, has wholly

failed to account for the use of said money or to give any plausible explanation as to the use hereof and the Referee finds that said sum of $5,377.37 was in the possession of the bankrupt at the date of the adjudication in bankruptcy herein and was and now is concealed by said bankrupt from her trustee in bankruptcy, George P. Clark.

The Referee further finds that the said bankrupt Edna G. Milens, now has in her possession said sum of $5,377.37 which she has failed and refused and still fails and refuses to account for or pay over to the trustee and which sum the Referee finds the bankrupt does now knowingly and fraudulently and wilfully conceal from her trustee in bankruptcy."

Said bankrupt alleges, with reference thereto, notwithstanding the findings of said Referee, she did not have in her possession, at any time, said alleged cash of $5,377.37 and has never had said amount, or any amount of money with reference thereto, then, ever since, or now.

VI.

Said bankrupt further alleges that she is wholly and completely financially embarrassed and has been for some time past, physically disabled.

Said bankrupt, as affirmative allegation herein, alleges:

I.

That there is a complete failure of proof in said cause, of facts warranting the findings of said Referee in said cause. [13]

II.

Said bankrupt further alleges that she has heretofore, in said cause, filed her petition to be discharged in bankruptcy; that there were no objections filed, save and except, by the J. P. Smith Shoe Company, a corporation, of Chicago, State of Illinois, which objection was filed on the 4th day of February, 1928. Said bankrupt further alleges that she filed her answer thereto; that a hearing was had thereon before said Referee on March 19, 1928; that said bankrupt, in said answer, prayed that the objection of said J. P. Smith Shoe Company, a corporation, be dismissed with prejudice; that said Referee, A. M. Cannon, in said cause, at said hearing on said 19th day of March, 1928, set, as a Special Master, and, as said bankrupt is now informed and believes, did, as such Special Master, deny the prayer of the answer of said bankrupt to said objections of said J. P. Smith Shoe Company, a corporation, to which acts and rulings of said Master, your bankrupt took exceptions on the ground that said Special Master, as such, at said time and place, acted outside of his authority in such cases made and provided.

III.

Said bankrupt shows to the Court that she has done everything within her power in the premises to keep within the law and to abide by all judgments of the Court and Referee in Bankruptcy herein; that if, in any particular, she has made any mistake, she alleges that it is without her knowledge and fault; that she makes this answer to said rule of

Court for the purpose of setting before the Court, the facts herein as she knows them, to the end that she may be purged of any contempt of court herein.

WHEREFORE, because of the premises, said bankrupt prays that her petition for discharge in bankruptcy be allowed; that said objections of the J. P. Smith Shoe Company, a corporation, in the premises, be denied with prejudice; that the rulings of said Special Master on legal points in said cause in said hearing on March 19, 1928, [14] be vacated and set aside; that said bankrupt be purged of and from any contempt of court herein, and for such other and further relief herein to the end that she may be discharged as a bankrupt in said cause, as heretofore prayed for by her.

EDNA G. MILENS, (Signed)
Bankrupt.

JAMES H. McMENAMIN, (Signed)
Attorney for Said Bankrupt.

State of Oregon,
County of Multnomah,—ss.

I, Edna G. Milens, being first duly sworn say that I am the bankrupt in the within entitled cause, and that the foregoing answer to rule to show cause, etc., is true as I verily believe.

EDNA G. MILENS.

Subscribed and sworn to before me this 23d day of March, 1928.

[Seal] T. J. CLEETON,
Notary Public for Oregon.

My commission expires Feb. 9, 1929.

Due and timely service of the foregoing, and the receipt of a duly certified copy thereof, as required by law, is hereby accepted in Portland, ——— County, Oregon, on this 25th day of March, 1928.

RALPH A. COAN,
Attorney for Trustee.

Filed March 26, 1928. [15]

AND AFTERWARDS, to wit, on the 15th day of June, 1928, as for April 23, 1928, there was duly filed in said court, an opinion, in words and figures as follows, to wit: [16]

[Title of Court and Cause.]

OPINION (ORAL).

Portland, Oregon, April 23, 1928.

R. S. BEAN, District Judge.—In this matter, Mrs. Milens was adjudged a bankrupt on the 3d of December, 1926. On the 21st of January of the following year on the hearing of a petition of the Trustee for an order requiring her to turn over to him certain property, the Referee found that during the year 1926 the bankrupt had received in cash from the sale of merchandise between $17,000 and $18,000 and had paid out for expenses and purchases, money and checks, the sum of $13,000, leaving a balance of about $5,000.00, which the Referee found that the bankrupt, although given an opportunity, had failed to account

for, and that she had that in her possession at the time of the adjudication and at the time of the order. He thereupon entered an order requiring her to pay over this amount of money to the Trutee within a given time, and the order was served upon the bankrupt, and upon her failure to comply with it, the facts were certified to the Court, and an order made requiring her to appear and show cause why she should not be punished for contempt. For answer to the show-cause order, the bankrupt says that she did not at the time the order was made by the Refere and does not now have possession of the money or any part thereof, and is therefore unable to comply with the order.

Now there is a decided conflict in the authorities as to how far if at all the Court, in a proceeding for contempt for failure to comply with the terms of the order, may go behind the findings of the Referee and examine into the merits of the case, one line of authorities holding that the Referee's findings are conclusive, and that the only question for the Court in a contempt [17] proceeding for failure to comply therewith, is to inquire what the bankrupt has done with the property since the order of the Referee, and whether she had present ability to comply with it. Another line holds that in a contempt proceeding, the Court may go back of the order of the Referee and examine the facts. The practice seems to have been considered more fully by the Circuit Court of Appeals of the Third Circuit than elsewhere, and the rule there is that in a contempt proceeding there

are two steps, first the finding of the Referee that the bankrupt had possession of the property which he was ordered to turn over, and that such order is final unless reviewed, and second, a proceeding for contempt, in which the only question is whether the bankrupt is then physically able to comply with the order previously made. But whatever the true rule may be, the Court may, of course, examine the findings and order of the Referee to determine whether or not it warrants the extraordinary power of punishing as for a contempt. The findings of the Referee are not that the bankrupt had in her possession any specific money or property belonging to the estate, which she was ordered to turn over to the trustee, but rather that she had received a certain sum of money during a given period, and was able to account for only a part thereof to the satisfaction of the Referee, and therefore that she must have the balance in her possession. These findings would probably be sufficient to justify, in a proper proceeding, a judgment against the alleged bankrupt for the balance, but are they sufficient to justify her punishment by imprisonment for contempt? I think not. The Bankrupt Act requires the Referee to certify the facts to the Court, and the Court to examine into the matter and if, in its judgment, the evidence is sufficient to proceed as for a contempt, but this statute does not invest the court of bankruptcy with superior powers to punish for contempt than is vested in the courts generally. What is legally sufficient to purge a contempt in other courts is

sufficient in a like contempt in the bankruptcy court. The bankruptcy court may [18] punish for contempt for failure to comply with a turnover order, provided the bankrupt has the property in his possession or under his control. The power to punish for contempt is an extraordinary power and should be carefully exercised and only when its propriety is beyond reasonable doubt. It should appear that there has been a wilful disobedience of the order, and that the party complained of has acted in bad faith for the purpose of evading the order. The law makes ample provision for the punishment of the bankrupt for fraudulently concealing his property or false swearing, and there is therefore no reason for a Court to imprison a bankrupt for the purpose of compelling him to turn over property in doubtful cases. It should not be used and cannot be used for the purpose of enforcing the payment of a debt. Before resort should be had to this proceeding it should clearly appear that the bankrupt actually had in his physical possession or under his control some specific money or property belonging to the estate, which he was ordered to turn over to the trustee, and which he wilfully refused to do. One Judge has said that the property should be specifically identified to enable the marshal to take it into his possession. It is not enough, as I understand, that through some process of reasoning the bankrupt may be held liable. The effect of the findings and order of the referee in this case is that the bankrupt has not accounted for all the money received

by her, and is therefore liable to the estate for the difference. To imprison her on that account would be to imprison her for a debt which is, of course, unthinkable.

So I take it that under this record an order discharging the bankrupt should be made.

Filed June 15, 1928, as of April 23, 1928. [19]

AND AFTERWARDS, to wit, on the 28th day of April, 1928, there was duly filed in said court an order purging of contempt, in words and figures as follows, to wit: [20]

[Title of Court and Cause.]

ORDER PURGING OF CONTEMPT.

Said cause having come on for hearing before the above-entitled court on Monday, the 16th day of March, 1928, upon rule to show cause why Edna G. Milens should not be punished for contempt for failure to obey lawful order, said Edna G. Milens appearing in person and by her counsel, James H. McMenamin, and the trustee in bankruptcy herein being represented by Coan & Rosenberg, attorneys at law, and the Court having heard the argument of the respective parties, and having taken said matter under consideration, and being fully advised in the premises, does now

ORDER that said contempt proceedings against said Edna G. Milens be, and the same are hereby

dismissed and she is purged of contempt in said cause.

(Signed) R. S. BEAN,
Judge.

Filed April 28, 1928. [21]

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Referee's certificate for contempt, order to show cause thereon, answer, opinion of the Court, and order in cause No. B.—10261, in the Matter of Edna G. Milens, Doing Business as Guarantee Shoe Store, Bankrupt, has been by me compared with the original thereof, and that each is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 15th day of June, 1928.

[Seal] G. H. MARSH,
Clerk.

By ————————,
Deputy Clerk. [22]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to Edna G. Milens, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the District of Oregon, wherein George P. Clark, Trustee in Bankruptcy of the Estate of Edna G. Milens, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. B. GILBERT, United States Circuit Judge for the Ninth Judicial Circuit, this 24th day of May, A. D. 1928.

WM. B. GILBERT,
United States Circuit Judge.

United States of America,—ss.

On this 5th day of June, in the year of our Lord one thousand nine hundred and twenty-eight, personally appeared before me, Ralph A. Coan, the subscriber, and makes oath that he delivered a true copy of the within citation together with copy

of petition for order allowing appeal, assignments of error and order allowing appeal to James H. McMenamin, attorney for Edna G. Milens.

RALPH A. COAN.

Subscribed and sworn to before me at Portland, this 5th day of June, A. D. 1928.

[Seal] ABE EUGENE ROSENBERG,
Notary Public for Oregon.

My commission expires Oct. 31, 1931. [23]

[Endorsed]: No. 5500. United States Circuit Court of Appeals for the Ninth Circuit. George P. Clark, Trustee in Bankruptcy of the Estate of Edna G. Milens, Appellant, vs. Edna G. Milens, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed June 18, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of EDNA G. MILENS, Doing Business as GUARANTEE SHOE STORE, Bankrupt.

PETITION FOR ORDER ALLOWING APPEAL FROM AN ORDER MADE BY THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON PURGING EDNA G. MILENS OF CONTEMPT.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, George P. Clark, Trustee in Bankruptcy of the above-entitled bankrupt estate, conceiving himself aggrieved by an order of the District Court of the United States for the District of Oregon entered on the 28th day of April, 1928, dismissing certain contempt proceedings against the said Edna G. Milens, bankrupt, for failing to comply with a valid and lawful order made by the Honorable A. M. Cannon, Referee in Bankruptcy, dated the 22d day of July, 1927, which order required the said Edna G. Milens to pay over to George P. Clark, as Trustee in Bankruptcy of the Estate of Edna G. Milens, bankrupt, the sum of $5,377.37 found by the Referee to be in the possession and control of said bankrupt on said day and fraudulently and wilfully concealed by her from her trustee and which order of the District Court of the United States for the District of Oregon also purged the said Edna G. Milens of contempt for failure to obey the order of the Referee, does hereby petition for an appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit and prays that his appeal may be

allowed and that a citation issue directed to Edna G. Milens, bankrupt, commanding her to appear before the United States Circuit Court of Appeals for the Ninth Circuit to do and receive what may appertain to justice to be done in the premises and that a transcript of the record, proceedings and other papers upon which said order was based, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

GEORGE P. CLARK,
Trustee in Bankruptcy of Edna G. Milens, Bankrupt.
COAN & ROSENBERG,
Attorneys for the Trustee and Petitioner.

State of Oregon,
County of Multnomah,—ss.

I, George P. Clark, being first duly sworn, depose and say that I am the duly qualified and acting trustee of the above estate; that I have read the foregoing petition and that the same is true as I verily believe.

GEORGE P. CLARK.

Subscribed and sworn to before me this 22d day of May, 1928.

[Seal] RALPH A. COAN,
Notary Public for Oregon.

My commission expires May 11, 1932.

[Endorsed]: Petition for Order Allowing Appeal from an Order Made by the District Court of the United States for the District of Oregon Purging

Edna G. Milens of Contempt. Filed May 24, 1928. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of EDNA G. MILENS, Doing Business as GUARANTEE SHOE STORE, Bankrupt.

ASSIGNMENTS OF ERROR.

Now comes George P. Clark, Trustee in Bankruptcy of the estate of Edna G. Milens, bankrupt, and files the following assignments of error on appeal from an order made and entered by the District Court of the United States for the District of Oregon, on the 28th day of April, 1928, dismissing contempt proceedings against Edna G. Milens and purging her of contempt for failure to obey an order of the Referee made on the 22d day of July, 1927.

1. That the United States District Court for the District of Oregon erred in making and entering an order on the 28th day of April, 1928, dismissing the contempt proceedings against the bankrupt Edna G. Milens and purging her of contempt for failure to obey the lawful order of the Referee in Bankruptcy dated the 22d day of July, 1927, requiring her to turn over the assets of said estate concealed by her in the sum of $5,377.37 to George P. Clark, Trustee in Bankruptcy of her estate.

2. That the United States District Court for the District of Oregon erred in dismissing the contempt proceedings and purging the bankrupt, Edna G. Milens, of contempt without requiring any affirmative showing by Edna G. Milens, bankrupt, or the offering of any testimony by her showing the disposition or disappearance of the sum of $5,377.37, which sum the Referee in Bankruptcy herein found she had in her possession on the 22d day of July, 1927, and which sum the Referee further found she was fraudulently and wilfully concealing from her trustee and which sum the Referee ordered turned over by the said bankrupt to George P. Clark, her trustee in bankruptcy.

3. That the United States District Court for the District of Oregon erred in failing and refusing to make and enter an order in said proceeding adjudging the bankrupt, Edna G. Milens, in contempt for failing to obey the lawful order of the Referee requiring her to pay over to George P. Clark, her Trustee in Bankruptcy, the sum of $5,377.37, which sum the Referee had ordered paid over to the said trustee by said bankrupt and from which order of the Referee no review or appeal was taken.

4. That the United States District Court for the District of Oregon erred in failing to accept, adopt and follow the findings of the Referee in Bankruptcy, to which findings no objections were made by the bankrupt and upon which findings an order was made and entered directing the bankrupt to pay to George P. Clark, Trustee in Bankruptcy of her

estate the sum of $5,377.37, from which order no review or appeal was ever taken.

WHEREFORE George P. Clark, Trustee in Bankruptcy of the estate of Edna G. Milens, bankrupt, prays that the said order so made on the 28th day of April, 1928, by the District Court of the United States for the District of Oregon may be vacated and that an order be made adjudging and decreeing Edna G. Milens in contempt for failure to obey the lawful order of the Referee in Bankruptcy dated the 22d day of July, 1927, requiring her to pay over to George P. Clark, her Trustee in Bankruptcy, the sum of $5,377.37.

COAN & ROSENBERG,

Attorneys for George P. Clark, Trustee in Bankruptcy of Edna G. Milens, Bankrupt.

[Endorsed]: Assignments of Error. Filed May 24, 1928. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of EDNA G. MILENS, Doing Business as GUARANTEE SHOE STORE, Bankrupt.

ORDER ALLOWING APPEAL WITHOUT BOND.

Now on this 24 day of May, 1928, the above-entitled proceeding coming on regularly to be heard upon the petition of George P. Clark, Trustee in

Bankruptcy of the estate of Edna G. Milens, bankrupt, praying that an appeal may be allowed him herein from that certain order of the District Court of the United States for the District of Oregon made and entered on the 28th day of April, 1928, and that citation issue as provided by law and that a transcript of the records, proceedings and other papers upon which said order was based, duly authenticated, be transmitted to the Circuit Court of Appeals for the Ninth Circuit and proper assignments of error having been presented with said petition and it appearing to the Court that said petitioner is entitled to said appeal,—

NOW, THEREFORE, ON MOTION OF RALPH A. COAN, of counsel for petitioner;—

IT IS HEREBY ORDERED that the said petition be and the same is hereby granted and the appeal of the petitioner from said order to the United States Circuit Court of Appeals for the Ninth Circuit is hereby allowed; and it further appearing that the appellant herein is the Trustee in Bankruptcy, it is further ordered that no bond be required of him.

WM. B. GILBERT,
Senior U. S. Circuit Judge.

Dated this 24 day of May, 1928.

[Endorsed]: Order Allowing Appeal Without Bond. Filed May 24, 1928. Paul P. O'Brien, Clerk.

No. 5500

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE P. CLARK, Trustee in Bankruptcy of the Estate of EDNA G. MILENS,

Appellant

vs.

EDNA G. MILENS,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Oregon.

COAN & ROSENBERG,
710 Pittock Block, Portland, Oregon,
Attorneys for Appellant.

JAMES H. McMENAMIN,
Selling Building, Portland, Oregon,
Attorney for Appellee.

No. 5500

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE P. CLARK, Trustee in Bankruptcy of the Estate of EDNA G. MILENS,
Appellant

vs.

EDNA G. MILENS,
Appellee.

BRIEF OF APPELLANT

STATEMENT OF THE CASE

In this matter, Edna G. Milens was adjudged a bankrupt on the 3rd day of December, 1926.

On June 23rd of the following year, George P. Clark, her trustee in bankruptcy filed a petition praying that an order be made requiring the bankrupt to forthwith deliver

and pay over to him, as trustee in bankruptcy of her estate, the sum of $5,377.37 wilfully and intentionally concealed by her from the said trustee in bankruptcy.

Thereafter and on the 22nd day of July, 1927 based upon hearings before Hon. A. M. Cannon, Referee in Bankruptcy on said petition, an order was made and entered by said Referee requiring Edna G. Milens, bankrupt, to account for and pay over to George P. Clark, trustee in bankruptcy of the above entitled bankrupt's estate on or before five days from the date of said order, the sum of $5,377.37 belonging to said estate and which amount she had in her possession and under her control at said time and which was being fraudulently concealed from said trustee.

At said time, namely on the 22nd day of July, 1927, findings of fact were made and entered by said Referee A. M. Cannon, which findings among other things, stated as follows:

"V

The Referee further finds that the bankrupt, although given every opportunity to explain what has become of said money, has wholly failed to account for the use of said money or to give any plausible explanation as to the use thereof and the Referee finds that said sum of $5,377.37 was in the possession of the bankrupt at the date of the adjudication in bankruptcy herein and was and now is concealed by said bankrupt from her trustee in bankruptcy, George P. Clark.

VI

The Referee further finds that the said bankrupt, Edna G. Milens, now has in her possession said sum of $5,377.37, which she has failed and refused and still fails and refuses to account for or pay over to the trustee and which sum the Referee finds the bankrupt does now knowingly and fraudulently and wilfully conceal from her trustee in bankruptcy."

No appeal or review was taken from said findings of the Referee or from the order based thereon dated July 22nd, 1927 requiring the bankrupt to pay to her trustee the sum of $5,377.37.

Thereafter and on the 24th day of August,

1927, Hon. A. M. Cannon, Referee in Bankruptcy, filed his certificate in the United States District Court for the District of Oregon stating the fact that said Edna G. Milens had failed to comply with said order dated the 22nd day of July, 1927 and the further fact that the said Edna G. Milens was in contempt for failure to obey said order and recommending that she be punished for contempt until she had paid to her trustee the sum of $5,377.37.

That on the 17th day of March, 1928, there was duly made and filed in the District Court of the United States for the District of Oregon, an order to show cause why Edna G. Milens should not be punished for contempt for failure to obey the Referee's order.

That on the 26th day of March, 1928, there was filed in the District Court of the United States for the District of Oregon, an answer by the bankrupt to the order to show cause. Said answer, among other things, merely stated that she submits herself to the above

entitled court and throws herself wholly and completely upon the mercy of the Court, and for the first time and eight months after the date of the findings and the order of the referee, questions the correctness of the same and alleges, under oath, that she cannot comply with the order.

Based upon said order to show cause and the answer of the bankrupt, the matter was set for hearing on the question of the bankrupt's contempt for Monday, March 26, 1928. That at said hearing, the records of the referee were before the Honorable District Court but the bankrupt offered no testimony, made no showing as to the reason for her failure to obey the referee's order and the District Court, without any testimony or argument, took the matter under advisement.

Thereafter and on the 23rd day of April, 1928, Honorable R. S. Bean, rendered an oral opinion which has been transcribed and appears in the Transcript of Record, page 14, stating that an order discharging the bank-

rupt should be made, which order was entered on the 28th day of April, 1928, purging the bankrupt of her contempt and from which order this appeal is taken.

SPECIFICATIONS OF ERRORS RELIED UPON

THE FIRST ERROR ALLEGED is the failure of the District Court of the United States for the District of Oregon to accept and adopt the findings and order of the Referee based thereon requiring the bankrupt to turn over to her trustee, money in her possession wilfully and unlawfully concealed by her from her trustee in bankruptcy from which findings and order of the Referee, no review or appeal was taken by the bankrupt and which, as a consequence thereof, became a final judgment.

THE SECOND ERROR ALLEGED is the making of the order by the District Court of the United States for the District of Oregon purging the bankrupt of contempt for her

refusal to obey a final order requiring her to pay to her trustee in bankruptcy, the sum of $5,377.37 found to be in her possession and wilfully and fraudulently withheld from her trustee, although the bankrupt offered no testimony, made no showing and called no witnesses in the contempt proceeding.

POINTS AND AUTHORITIES

I

THE REFEREE'S ORDER TO TURN OVER CONCEALED ASSETS WHICH HAS NOT BEEN REVIEWED OR APPEALED FROM, IS A FINAL ORDER AND IN A PROCEEDING AGAINST THE BANKRUPT FOR CONTEMPT FOR FAILURE TO OBEY SAID ORDER, THE DISTRICT COURT WILL NOT EXAMINE THE EVIDENCE OR REVIEW THE ISSUES UPON WHICH THE ORDER WAS BASED, AS THE ONLY ISSUE BEFORE THE DISTRICT COURT IS THE QUESTION OF THE DISPOSITION OF THE PROPERTY BY THE BANKRUPT SINCE THE DATE OF

THE ORDER, THE BANKRUPT BEING ESTOPPED FROM DENYING THAT SHE WAS IN POSSESSION OF THE PROPERTY DIRECTED TO BE TURNED OVER.

7 Remington on Bankruptcy (3rd Ed.) page 89, Section 3043.

5 Remington on Bankruptcy (3rd Ed.) page 560, Section 2428.

In re Frankel (U.S.D.C.N.Y. So. Dis. 1911) 25 Am. B. R. 920, 922; 184 Fed. 539.

In re Weber Co. (U.S.C.C.A. 2nd Cir. 1912) 29 Am. B. R. 217, 219; 200 Fed. 404.

In the matter of Geo. Shelley (U.S.D.C. So. Dis. of Calif. 1925) 6 Am. B. R. (N.S.) 491, 493; 8 Fed. (2nd) 878.

United States Ex. Rel. Paleais v. Moore (U.S.C.C.A. 2nd Cir. 1923) 2 Am. B. R. (N.S.) 699, 707; 294 Fed. 852.

In the matter of Oriel & Confino (U.S. C.C.A. 2nd Cir. 1928) 11 Am. B. R. (N.S.) 363, 368; 23 Fed. (2nd) 409.

II

THE BURDEN OF PROOF IN A HEARING ON A CONTEMPT PROCEEDING IS UPON THE BANKRUPT TO SATISFACTORILY ACCOUNT TO THE DISTRICT COURT

FOR THE DISPOSITION OF ASSETS SINCE THE DATE OF THE REFEREE'S ORDER, AND SHE CANNOT ESCAPE AN ORDER FOR COMMITTAL BY SIMPLY DENYING, UNDER OATH, IN HER SWORN ANSWER TO THE RULE TO SHOW CAUSE THAT SHE HAS ANY ASSETS.

1 Collier on Bankruptcy (13 Ed.) page 996, Sec. 41.

1 Collier on Bankruptcy (13 Ed.) page 993, Sec. 41.

In re Meier (C.C.A. 8th Cir. 1910) 25 Am. B. R. 272, 275; 182 Fed. 799.

In re Deuell (U.S.D.C. Wes. Dis. Mo. 1900) 4 Am. B. R. 60, 62; 100 Fed. 633.

In Dittmar v. Michelson (U.S.C.C.A. 3rd Cir. 1922) 48 Am. B. R. 639, 643; 281 Fed. 116.

In Power v. Fuhrman (U.S.C.C.A. 9th Cir. 1915) 34 Am. B. R. 418, 421; 22 Fed. 787.

In the matter of George Shelley (U.S. D.C. So. Dis. Calif. 1925) 6 Am. B. R. (N.S.) 491, 494; 8 Fed. (2nd) 878.

In re Magen Co. Inc. (U.S.D.C. Ea. Div. of N.Y. 1926) 8 Am. B. R. (N.S.) 543, 547; 14 Fed. (2nd) 469.

In re Magen Co. Inc. (U.S.C.C.A. 2nd Cir. 1925) 7 Am. B. R. (N.S.) 283, 288; 10 Fed. (2nd) 91.

Reardon vs. Pensaneau (U.S.C.C.A. 8th Cir. 1927) 9 Am. B. R. (N.S.) 519, 520; 18 Fed. (2nd) 244.

ARGUMENT

From what has been stated, it will be readily observed that the appellant in this brief has condensed the assignments of error, being four in number as they appear in the Transcript of Record, pages 24 to 26 inclusive, to two main points for argument.

Briefly stated, the District Court in its oral opinion on the contempt proceeding, page 14 of the Transcript of Record to page 18 inclusive, placed an interpretation on the findings of the Referee not warranted by the findings themselves and from which findings and order based thereon no review or appeal was taken by the bankrupt. The District Court stated, page 16 of the Transcript of Record—"The findings of the Referee are not that the

bankrupt had in her possession any specific money or property belonging to the estate, which she was ordered to turn over to the trustee, but rather that she had received a certain sum of money during a given period, and was able to account for only a part thereof to the satisfaction of the Referee, and therefore that she must have the balance in her possession."

The conclusive findings of the Referee from which no appeal had been taken on this particular point, is as follows, page 6 of the Transcript of Record:

> "The Referee further finds that the said bankrupt, Edna G. Milens, now has in her possession said sum of $5,377.37, which she has failed and refused and still fails and refuses to account for or pay over to the trustee and which sum the Referee finds the bankrupt does now knowingly and fraudulently and wilfully conceal from her trustee in bankruptcy."

The appellant submits that the District Court erred in so interpreting the findings of the Referee contrary to their plain and ex-

press meaning and also by examining into the findings and order from which no review or appeal had been taken. In support of appellant's contention, he has formed his first point and submits the following authorities in support thereof.

7 Remington on Bankruptcy (3rd Ed.) page 89, Section 3043, states the rule as follows:

> "Although some decisions seem to indicate the contrary, it is on principle and by the weight of well-considered authority directly on the point, undoubtedly the true rule that, on contempt for disobedience of an order to surrender assets, the evidence on which the original order was based is not to be re-examined—for the way to correct erroneous orders for surrender of assets 'is by appeal, not by disobedience'."

5 Remington on Bankruptcy (3rd Ed.) page 560, Section 2428, states the rule as follows:

"On principle it would seem that, since the order to surrender assets may be granted only on convincing evidence or evidence beyond a reasonable doubt, the court, on contempt proceedings for failure to obey such order, ought not to go behind the order itself, if the order was not appealed from, and ought to take into consideration only facts arising subsequently thereto, leaving the propriety of the order itself remediable by appeal or petition for review, since otherwise the contempt proceedings would be diverted into an appeal from the order of the surrender itself."

In re Frankel (U. S. D. C. N. Y. So. Dis. 1911); 25 Am. B. R. 920, 922; 184 Fed. 539, District Judge Hand in speaking for the Court said:

"On the other hand, our own Circuit Court of Appeals, in Re Stavrahn (C.C.A., 2d Cir.), 23 Am. B. R. 168, 174 Fed. 330, 98 C. C. A., 202, proceeded upon the theory that the bankrupt upon such a proceeding must show that since the date of the order he had lost ability to comply with it, and that if he did not show that an order of

committal was proper. Although it is not expressly so stated, the reasoning appears to be based upon the understanding that the order concluded the controversy up to the date of its entry. The words used are that the order makes a prima facie case; but, of course, no judgment inter alios makes any case whatever and is immaterial. The reason why they did not say that it made a conclusive case was, I think, because the bankrupt might show that since the order he had parted with the funds. In addition, it is of much authoritative weight that it has undoubtedly been the practice in this district to treat such orders as conclusive estoppels upon the date of their entry, and to leave open to the respondent only the issue of showing what he has done with the money since that time."

In re Weber Co. (U.S.C.C.A. 2nd Cir. 1912) 29 Am. B. R. 217, 219; 200 Fed. 404, came up on a petition to revise an order of the District Court sitting in bankruptcy, which order adjudged one Max Weber to be in contempt of the bankruptcy court because of his disobedi-

ence of an order which directed him to deliver $7,000 to the trustee of the bankrupt's estate. Circuit Judge Lacombe, in speaking for the Court, said:

> "We think the conclusion of the district judge was correct; it was in strict conformity with the opinion of this court in the matter of Stavrahn (C.C.A., 2nd Cir.), 23 Am. B. R. 168, 174 Fed. 330. The petitioner had full opportunity before the referee to put in any proofs he might wish to as to whether or not he was then concealing the $10,000. Testimony was taken and upon it the referee found that on August 28th, 1911, he was concealing that sum. He made no opposition to this finding, did not seek to review it in any way, nor has he asked for a re-opening on the strength of new evidence or for any other reason. Surely there was nothing for the district judge to do except to assume that such finding was correct; it established prima facie that Weber had at one time $10,000 which he was secreting from the estate and his bare denial without corroborative proof was insufficient to overcome such prima facie case.
>
> Upon the application to punish for contempt he made no explanation as to how or why it was that this particular sum had disappeared, merely denying that he ever had it. His statement that he

had no money, when the proceeding for contempt was instituted, without some such explanation was insufficient and the judge quite properly held him on contempt for not paying it over. To excuse disobedience of the order by such general denial would make it easy to evade the requirements of the Bankruptcy Act."

In the matter of George Shelley (U.S.D.C. So. Dis. of Calif. 1925) 6 Am. B. R. (N.S.) 491, 493; 8 Fed. (2nd) 878, based upon the records and books of the bankrupt, the Referee found that there was at the time of bankruptcy a shortage of merchandise amounting to $82,328.60, and that the bankrupt failed to enter in his record the cash sales of merchandise which had cost him the said sum. After making fair and reasonable deductions the Referee found that the sum of $50,000 was in the hands and possession of and under the control of the bankrupt, and concluded as a matter of law that the

trustee in said bankrupt estate was entitled to an order directing the bankrupts to turn over to the trustee the said sum of $50,000 and made an order accordingly which was not obeyed and which the referee certified to the court requesting that the bankrupt be punished for contempt. District Judge Henning, in speaking for the Court said:

> "It appears from the record that neither the bankrupt, George Shelley nor either of his sons took any steps to review the order of the referee of February 24, 1925. Nowhere in the subsequent proceedings do they attempt to do anything except to say that they have not the money now, or the property, and that they never had it. Their counsel argues in an elaborate and capable brief that the court may not proceed in contempt against them without first trying the issues determined by the referee de novo. The attorney for the trustee in two briefs takes the position that the order of the referee not having been reviewed is a final judgment and that this court cannot review the facts upon which the order is based under contempt proceedings.
>
> The cases cited by counsel indicate that the courts are not wholly in harmony on the general propositions here involved.

Most of them deal with a radically different set of facts. The Bankruptcy Act, in section 2 and other sections, provides for a review of the orders of the referee. General Orders, Number 27 (Collier, 13th Ed., p. 1834), and Rule 84 of this court specifically set out the steps to be taken for the purpose of reviewing the acts of the referee. No such review having been taken in this case, it must be assumed that the finding of the referee and the order that the bankrupt and his sons turn over to the trustee the sum of fifty thousand dollars ($50,000) was well founded. If that order is not now reviewable by this court, then the only thing to be tried on this proceeding is the question of the disposition of this money by the bankrupt and his sons, since the time of the order made by the referee. At the hearing there was no effort or attempt on the part of the persons charged to do this. Their position simply was that they never received the money in question and are now not in possession of it. The assertion of present inability to turn over, without further explanation, apparently does not furnish any evidence of what has become of it.

Without passing upon the power of the court to try the facts de novo, under the record before me, I am of the opinion that good practice, proper procedure and the weight of judicial opinion does not call for such review in this case. In re

Frankel (D.C., N.Y.) 25 Am. B. R. 920, 184 F. 539; Power v. Fuhrman (C.C.A., 9th Cir.), 34 Am. B. R. 418, 220 F. 787.

It follows necessarily that the said George Shelley, Ben Shelley and Abe Shelley and each of them is now in contempt of this court and that a committal must issue. The warrant will be stayed for ten (10) days, in order that the bankrupt and his sons or either of them if they so wish, may forthwith take an appeal to the Circuit Court of Appeals. I am persuaded to do this in view of the fact that in this, the Ninth Circuit, there is no authoritative decision definitely settling the precise issues here involved."

In the matter of United States Ex. Rel. Paleais v. Moore, (U.S.C.C.A. 2nd Cir. 1923) 2 Am. B. R. (N.S.) 699, 707; 294 Fed. 852, Circuit Judge Rogers in speaking for the court said:

"In determining this question we do not sit to review the order of October 3, 1922, directing the relator to turn over the books and papers, or the order adjudging

him in contempt on March 22, 1923. If the order of March 22, 1923 adjudging the relator to be in contempt was erroneous, the remedy for a review of the validity of that order was by a petition to revise it. That order was made in a proceeding in bankruptcy within the meaning of section 24b of the Bankruptcy Act (Comp. St., Sec. 9608), which gives to this court jurisdiction to revise in matter of law 'the proceedings of the several inferior courts of bankruptcy' within our jurisdiction; and the order cannot be brought here for examination in any other way than by petition to revise. In the case of in re Shidlovsky (C.C.A., 2nd Cir.) 34 Am. B. R. 861, 224 Fed. 450, 140 C. C. A. 654, this court held that in such cases the only remedy is by petition to revise under section 24b. In Kirsner v. Taliaferro (C.C.A., 4th Cir.), 29 Am. B. R. 832, 202 Fed. 51, 120 C. C. A. 305, the Circuit Court of Appeals for the Fourth Circuit held that an order requiring a bankrupt to turn over property to his trustee, and committing him until he does so, is reviewable only by petition to revise. See, also, Freed v. Central Trust Co. (C.C.A., 7th Cir.) 33 Am. B. R. 64, 215 Fed. 873, 875, 132 C. C. A. 7; Henkin v. Fousek (C. C. A., 8th Cir.), 46 Am. B. R. 97, 267 Fed. 557; Horton v. Mendelsohn (C. C. A., 3rd Cir.), 41 Am. B. R. 648, 249 Fed. 185, 161 C. C. A. 221; Henkin v. Fousek (C. C. A., 8th Cir.), 40 Am. B. R. 701, 246 Fed. 285, 159 C. C. A.

15; Good v. Kane (C. C. A., 8th Cir.), 32 Am. B. R. 19, 211 Fed. 956, 128 C. C. A. 454. We are not aware of any case which asserts a contrary doctrine.

This court recently, in Ex. parte Craig, 282 Fed. 138, had occasion to consider at great length the right to employ the writ of habeas corpus as a method of examining into the validity of an order adjudging one guilty of a contempt of court and restraining him of his liberty as a punishment therefor. The conclusion to which we arrived in that case, and which we believe is amply sustained by the authorities, is that in a habeas corpus proceeding the appellate court examines only the power and authority of the lower court to act and not the correctness of its conclusions. The order restraining one of his liberty cannot be collaterally attacked in habeas corpus proceedings for errors and irregularities not affecting the jurisdiction. Adhering as we do to the doctrine therein announced, we hold that the only matter which can now be considered is the matter of the lower court's jurisdiction at the time it made the order adjudging the relator in contempt, and directing his confinement in the Raymond Street Jail until he purged himself of such contempt, or until the further order of the court. Since this opinion was handed down, this court's decision in the case of Ex. parte Craig, 282 Fed. 138, has been

> affirmed by the Supreme Court of the United States. Craig v. Hecht, 44 Sup. Ct. 103, 68 L. Ed.—"

In the Matter of Oriel & Confino (U.S.C.C. A. 2nd Cir. 1928) 11 Am. B. R. (N.S.) 363, 368; 23 Fed. (2nd) 409. The facts are that on October 22, 1926, an order was made directing the appellants to turn over to the receiver within three days, the books of account used by the bankrupts during the year 1925. No appeal was taken from this order and thereafter the present motion was made to punish them for contempt for failure to obey. An order has been entered below "committing them to jail, to be confined and detained for their alleged contempt in failing to comply with the terms of the order." Circuit Judge Manton, in speaking for the court, said:

> "The regularity, correctness or validity of the order disobeyed cannot be examined in this proceeding to punish. Even

if it was improvidently granted or irregularly obtained, it must nevertheless be respected until it is annulled by the proper authority. Cape May R. R. Co. v. Johnson, 35 N. J. Eq. 422. The only inquiry is whether the court granting the injunction had jurisdiction of the subject-matter and of the parties, and whether the order has been violated. Therefore, it was not incumbent upon the appellee in this proceeding, which we hold to be a civil contempt, to establish beyond a reasonable doubt that they had the books and continued in their possession, and are wilfully refusing to turn them over. That was a matter for determination on the motion in the turnover proceeding. In that proceeding it was determined that the appellants were able to deliver up the books in question, and that they had them either in their possession or under their control. No appeal was taken from the order. They must be committed until they can satisfy the court that they should be purged of the contempt committed, either by compliance with the order or some remedial relief be accepted, or otherwise satisfy the court that their committment should be lifted and they be released. Kirsner v. Taliaferro (C.C.A., 4th Cir.), 29 Am. B. R. 832, 202 F. 51."

The foregoing authorities amply indicate that the findings and order of the Referee requiring the bankrupt to turn over $5,377.37 to her trustee in bankruptcy was a final order and it was manifest error for the District Court to permit the bankrupt to accomplish by disobedience of said order, what she had failed to do by appeal.

Under point two of authorities, the rule has been stated in effect that it was error for the District Court to purge the bankrupt of contempt for her refusal to obey the final order requiring her to pay her trustee the sum of $5,377.37 found to be in her possession and fraudulently withheld from her trustee, regardless of the fact that she offered no testimony, made no showing and called no witnesses in the contempt proceeding.

The transcript of record discloses that all that appears of record in connection with the contempt proceeding is the rule to show cause why Edna G. Milens should not be

punished for contempt for failure to obey lawful order, Transcript of Record, page 7; the answer of the bankrupt to the rule to show cause why she should not be punished for contempt, Transcript of Record, page 9; the opinion of the District Court, Transcript of Record, page 14; and the order purging the bankrupt of contempt, Transcript of Record, page 18.

The District Court had before it the findings of fact of the referee dated July 22, 1927, the order of the referee dated July 22, 1927, and the referee's certificate of contempt for failure to obey lawful order dated the 24th day of August, 1927. At the hearing on the contempt proceeding held on March 26, 1928, the bankrupt called no witnesses, did not herself take the stand, offered no testimony of any kind whatsoever and made no affirmative showing as to why she should not be held for contempt for failure to obey the Referee's order.

The bankrupt submitted the matter en-

tirely upon her answer to the rule to show cause, Transcript of Record, pages 9 to 14 inclusive, which answer, as already stated in this brief, for the first time attempted to attack the findings and the order of the referee eight months after the same had been entered. The only material and pertinent allegation in said answer to the rule to show cause, being paragraph VI of the same, in which she alleges as follows:

> "Said bankrupt further alleges that she is wholly and completely financially embarrassed and has been for some time past, physically disabled."

In other words, the bankrupt sought to avoid punishment from her disobedient act by merely stating in effect that she is "wholly and completely financially embarrassed and has been for some time past, physically disabled."

With no other statement or testimony to guide the Court in its decision, the District Court of the United States for the District of Oregon purges the bankrupt of contempt.

That this is not the law and that the Court committed error is found in a great mass of texts and cases from which the appellant has selected the following:

1 Collier on Bankruptcy, (13th Ed.) page 996, Section 41, the rule is stated as follows:

> "Upon a motion to punish a bankrupt for contempt because of his refusal to obey the order of the referee directing him to turn over certain property to his trustee, the only question at issue is the disposition of the property by the bankrupt since the date of the order; the bankrupt is estopped from denying that he was in possession of the property directed to be turned over."

1 Collier on Bankruptcy (13th Ed.), page 993, Section 41, the rule is stated as follows:

> "Property of a bankrupt estate, traced to the recent control or possession of the bankrupt, or a third person is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance and that he cannot escape an order for its surrender by simply denying under oath that he has it, or that it is the property of the bankrupt estate."

In re Meier (C. C. A. 8th Cir. 1910), 25 Am. B. R. 272, 275; 182 Fed. 799, in which the facts are that within a week before the filing of the petition in bankruptcy, the treasurer of the bankrupt corporation obtained in his possession in cash over $21,000, all of the available assets of the bankrupt and the night before the petition in bankruptcy was filed, he left the city and did not return until the year following and the president thereafter compelled him to turn over to the trustee $12,500 of such money claimed to be still in his possession, but he not only failed to account for the money so received by him, but refused to answer any question relative to its disposition, merely stating that he had no property of the bankrupt in his possession and to most of the questions asked him dealing with the bankrupt estate, which he did not answer, he returned only the sterotyped answer, that he did not remember.

District Judge Reed in speaking for the court which was heard before Sanborn and Van Devanter, Circuit Judges, stated:

"But the settled rule is that, when property of a bankrupt estate is traced to the possession of one who receives it upon the eve of the bankruptcy of its owner, it is presumed that it remains in his possession or under his control until he satisfactorily accounts to the court of bankruptcy for its disposition or disappearance; that the burden is upon him to satisfactorily so account for it; and that he cannot escape an order for its surrender by simply denying under oath that he has it, or that it is the property of the bankrupt estate. Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224, 22 Sup. Ct. 269, 46 L. Ed. 405; Boyd v. Glucklich (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 135-143, 53 C. C. A. 451; Schweer v. Brown C. C. A., 8th Cir.), 12 Am. B. R. 178, 130 Fed. 328, 64 C. C. A. 574; In re Salkey, 21 Fed. Cas. Nos. 12-253 and 12, 254."

In re Deuell (U. S. D. C. Wes. D. Mo. 1900), 4 Am. B. R. 60, 62; 100 Fed. 633. This case is certified to the court by the referee in bankruptcy for contempt by the bankrupt and based upon the bookkeeping records of

the bankrupt. District Judge Phillips in speaking for the court, said:

> "Will the law permit that a responsible merchant upon whose credit such a large amount of goods had been obtained, may thus shut her eyes, and make no inquiry and learn nothing about her business, ask nothing about the proceeds of the goods which were daily and weekly disappearing from the store, and when called upon by the court to account therefor, or to render some reasonable explanation thereof, to escape the penalties of the bankrupt law by simply saying, 'I have not the goods. I have no money?' She either has the money, or her husband and son embezzled it. They testified before the referee that they did not appropriate or have the money. Under such a state of affairs there can be but one judgment pronounced by the court, and that is that she must account for this money or pay the penalty of her delict. The court, dealing in the most humane manner with this bankrupt, and making every possible allowance for improvident sales and careless business methods, and the loss that could reasonably result therefrom, finds that there must be in her hands, or under her control, at least the sum of $3,000 which she has failed to schedule or turn over to the trustee in bankruptcy, and that she stands in con-

> tempt of the order of the referee to that extent and therefore the order of the court will be that she stand committed to the jail in Bates county, in this district, until she accounts for and turns over to the trustee in bankruptcy herein said sum of $3,000, or the further order of this court."

In re Dittman vs. Michelson (U. S. C. C. A. 3rd Cir. 1922), 48 Am. B. R. 639, 643; 281 Fed. 116, where the evidence showed that five months prior to the bankruptcy, the bankrupt had a deposit of several thousand dollars in a bank where he denied having an account, but that most of such deposit had been withdrawn from the bank to the order of "cash," and the bankrupt refuses to tell of the disposition of such money and an order was made by the referee directing him to pay over such money to his trustee in bankruptcy. Circuit Judge Buffington in speaking for the court said:

> "The orders to turn over being proper, the assets being presumptively in the bankrupt's possession, it will now be for him, in the subsequent proceeding, to show how and when they passed out of his possession. If the fear of incriminating himself prevents him from disclosing what he has done with such assets, that is an unfortunate situation, which the bankrupt has brought on himself; but it nevertheless leaves the case without any explanation by him of what he is now called upon to explain, namely, what he has done with the assets."

In Power vs. Fuhrman, (U. S. C. C. A., 9th Cir. 1915), 34 Am. B. R. 418, 421; 22 Fed. 787, being the only case from the Circuit Court of Appeals from this Circuit that the writer has been able to find excluding the case in the matter of George Shelley supra from the United States District Court for Southern District of California, wherein on petition of trustee, an order was made requiring him and his wife to turn over to the

trustee in bankruptcy the sum of $9,000 found to be in their possession and under their control and to belong to the estate of the bankrupt, to which petition the bankrupt had filed a verified answer and the issues thereby raised having come on regularly for hearing before the referee in bankruptcy. Review of this action of the referee was affirmed by the District Court.

No review of that judgment was sought by either the bankrupt or his wife and not having been complied with, the matter was again brought to the attention of the District Court on a contempt proceeding and resulted in the District Court discharging Ray Furhman, the wife of the bankrupt of contempt. The matter came before the Circuit Court on a petition to revise the decision of the court discharging the order thereby made to show cause why she should not be punished for contempt. Circuit Judge Ross in speaking for the court, which was before Gilbert, Ross and Morrow, Circuit Judges, said:

"The judgment of the court below, confirming the findings and order of the referee, not having been appealed from or otherwise questioned by either of the respondents established that at the date of its entry—July 23, 1913—the money in question was in the actual possession and under the control of the said bankrupt and his said wife, and was then fraudulently concealed and withheld from the creditors of the bankrupt. That judgment placed the legal duty upon both husband and wife of complying with its requirements. That such compliance is enforceable by proceedings in contempt is beyond question. Equally plain is it that the burden is upon the delinquent who claims to be incapable of making the delivery decreed, to prove the fact of such inability."

The above case sustains the appellant's contention that in the Ninth Circuit the burden is upon the delinquent, who claims to be incapable of making the delivery decreed, to prove the fact of such inability. The bank-

rupt made no effort to sustain this burden in the instant case.

In the matter of George Shelley (U. S. D. C. So. D. Calif. 1925), 6 Am. B. R. (N.S.) 491, 494; 8 Fed. (2nd) 878, being the only expression available from the District Courts within the Ninth Circuit and touching upon this point, District Judge Henning said:

> "If that order is not now reviewable by this court, then the only thing to be tried on this proceeding is the question of the disposition of this money by the bankrupt and his sons, since the time of the order made by the referee. At the hearing there was no effort or attempt on the part of the persons charged to do this. Their position simply was that they never received the money in question and are now not in possession of it. The assertion of present inability to turn over, without further explanation, apparently does not furnish any evidence of what has become of it."

The District Court apparently relied on

the case of Power v. Fuhrman, supra, which is also relied on by the appellant in this brief.

In re Magen Co. Inc. (U. S. D. C. Ea. Div. of N. Y. 1926), 8 Am. B. R. (N.S.) 543, 547; 14 Fed. (2nd) 469 was a hearing on an order to show cause why the motion theretofore made and granted to punish one Herbert Magen for contempt should not be considered and vacated. The contempt order was stayed pending the hearing by the Circuit Court of Appeals on a petition to revise the turnover order, on which was based the contempt order. District Judge Inch in speaking for the court, said:

> "An illegal possession and disobedience may be shown by circumstantial evidence, yet before such evidence will justify an imprisonment, possibly for a considerable period, it should be both convincing and exceptionally plain. It therefore comes down to this: This court must now be satisfied beyond a reasonable doubt that Magen is wilfully disobeying the order to turn over. The burden of proof of show that he is so doing rests on the trustee. That burden is met in the first instance by proof that a court by

order has duly found that Magen is in possession of the property, that it belongs to the estate of the bankrupt, and that he has failed to obey the order to turn over. Magen must then offer proof to explain this failure to obey. Otherwise, a wilful disobedience may be reasonably found.

Mere denials or protestations of inability are not proof; they simply raise the issue which calls for proof. Finally, when both sides have rested, if the court is then satisfied, beyond a reasonable doubt, of the present wilful disobedience of Magen, it may imprison him as a punishment. Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224, 22 S. Ct. 269, 46 L. Ed. 405; In re Schlesinger (C. C. A., 2nd Cir.), 4 Am. B. R. 361, 102 F. 117, 42 C. C. A., 207; in re McCormick supra."

In re Magen Co. Inc. (U. S. C. C. A. 2nd Cir. 1925), 7 Am. B. R. (N.S.) 283, 288; 10 Fed. (2nd) 91, wherein the testimony adduced before the referee on application for the turn-over order was based upon an audit of bankrupt's books and records. There was no testimony or findings where concealed prop-

erty could be located and the turn-over order was for the sum of $32,779.74. Circuit Judge Rogers in an exhaustive opinion which is quoted herein at length, in speaking for the court before Rogers, Hough and Manton, Circuit Judges, said among other things:

> "The law relating to turn-over orders is pretty well established in this circuit. In 1900 this court, decided in re Schlesinger, (C. C. A. 2nd Cir.), 4 Am. B. R. 361, 102, F. 117, 42 C. C. A. 207. In that case the referee found no definite property or money in the possession of the bankrupt. He therefore refused to enter a turn-over order. The District Court reversed his decision, inasmuch as it appeared that upwards of $10,000 had been unaccounted for by him. It therefore held that it was still in his possession or control. But to avoid any question of doubt the court fixed the amount to be turned over at $6,500. The case was brought into this court upon a petition to review and the order of the District Court was affirmed. Judge Shipmen, writing for the court, said:
>
> > 'If we had power to review the correctness of the finding that the testimony was such as to satisfy one beyond a reasonable doubt that the money was in the possession or under

the control of the bankrupt, and mindful of the importance of observing caution in the investigation, we should have no hesitation in affirming the finding of fact. It is not denied that clause 13 of section 2 of the Bankrupt Act (Comp. St., Sec. 9586) authorizes the court of bankruptcy to "enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment," and that disobedience of a lawful order of a referee is punishable by the judge as for a contempt committed before the court of bankruptcy; but it is contended that disobedience of an order to the bankrupt to pay or deliver a sum of money in his possession to his trustee cannot be punished by proceedings in contempt, because the order is for the payment of a debt, and imprisonment for debt has been abolished in the state of New York, and by section 990 of the Revised Statutes (Comp. St., Sec. 1636) no person can be imprisoned for debt by process issuing from the courts of the United States in a state where by its laws imprisonment for debt has been abolished.'

The court disposed of the objection arising from the fact that imprisonment for debt had been abolished by declaring that the order was not for the payment of

a debt, but for the delivery by the bankrupt of the assets of his estate to his trustee in bankruptcy. 'He was not indebted to the trustee. The money was a part of his assets and estate, which had by operation of law become vested in the trustee.'

In 1905 this court decided In re Levy (C. C. A. 2nd Cir.), 15 Am. B. R. 166, 142 F. 442, 73 C. C. A. 558. The question came up on petition to review a turn-over order. At the time of the filing of the involuntary petition in bankruptcy it appeared from the books of the bankrupts that there should have been on hand at the time the petition was filed a balance in goods or cash of $18,921.87. The value of the goods on hand amounted to only $6,000, and the value of goods unaccounted for was $12,921.87. The referee declined to order this amount turned over to the trustee, holding that the showing on the books at most raised an inference that the property was in the hands of the bankrupts. The District Judge refused to confirm the order and said:

> 'The question is whether it is sufficient for the bankrupts to state that they have not the property. If they have not the property, they should tell what they did with it. If they cannot do this, the court would be justified in finding that they still had it. Their books, kept for the very purpose of showing what they have or have not,

> state that they have this balance. The record is their own. If it is not complete, let them complete it. Their own written books, to the effect that they have $12,921.87 is better than their generalization that they have none of it. If it were sufficient for a bankrupt to deny generally, in the face of his own books, the suppression of assets would be unimpeded. Another opportunity should be given the bankrupts to make the necessary explanation and point out with some approximate accuracy the disposition of so large an amount of goods within so short a space of time.'

When the matter went back to the referee the bankrupts failed to make any explanation of what they had done with the property. A turn-over order was made by the referee, the District Court approved, and this court affirmed.

In 1906, in Re Weinred (C. C. A., 2nd Cir.), 16 Am. B. R. 702, 146 F. 243, 76 C. C. A. 609, there was a shortage of assets of $60,000 for which the bankrupts did not satisfactorily account. On their examination they were asked as to certain sums they had drawn out of the bank in cash and which aggregated $18,200 At first they refused to answer questions concerning it, but subsequently gave a story in which they undertook to account for it. District Judge Holt considered the

story as extremely improbable. He said:

> 'It is precisely the kind of story which bankrupts would tell, who had been engaged in the diamond business and had been planning a fraudulent bankruptcy, and had drawn $18,000 in cash just before their bankruptcy, for the purpose of concealing it from their creditors. I cannot avoid the conclusion that their story is an entire fabrication, and that the bankrupts have this money concealed from their creditors, and that they should be ordered to pay it to the trustee.'

And he entered an order directing them to turn over to the trustee $18,200 which they had drawn out of the bank in cash between July 11th and July 20th. The matter came into this court on a petition to revise and it was affirmed.

In 1909 the court decided in Re Stavrahn (C. C. A., 2nd Cir.), 23 Am. B. R. 168, 174 F. 330, 98 C. C. A. 202, 20 Ann. Cas. 888. In that case the doctrine is stated by Judge Lacombe that, if it is shown that the bankrupt was in the actual possession of a particular sum of money a few months before the turn-over order, it was incumbent on him to give some reasonable explanation as to why it was that he did not turn it over in compliance with the order requiring him so to do. In that case his sole averment was:

> 'That the reason your dependent has not turned over said sum is because he has no such sum in his possession or under his control, directly or indirectly, and has no means whatsoever of obtaining said sum of money.'

And this court said that his averment 'is too bald and indefinite to have any persuasive force.' * * * *

Our attention is also called to In re Redbord (C. C. A., 2d Cir.) 5 Am. B. R. (N.S.) 357, 3 F. (2d) 793, 794, where this court, speaking through the present writer, said:

> 'To warrant the order to turn over the money, it must appear not only that the money to be turned over is part of the bankrupt's estate, but that the money is in his possession or under his control at the time the order to turn it over is made.'

We do not doubt the correctness of the statement quoted, and it is evident that the referee and the District Judge were satisfied that what the respondent is directed to turn over in the order sought to be revised is part of the bankrupt's estate. If there is in this record no evidence upon which that conclusion can be based it would be the duty of this court to reverse the order. But this court thinks

that there is such evidence. And if it so thinks there is nothing for us to do but to affirm the order.

In United States v. Moore (C. C. A., 2nd Cir.) 2 Am. B. R. (N.S.) 699, 294 F. 852, 856, this court, speaking of an order punishing for contempt one who had failed to comply with a turn-over order said that 'the court should be satisfied of the present ability of the bankrupt to comply with it.' That, too, is undoubtedly true. But it is not to be overlooked that when the property is traced into the bankrupt's possession and he fails to produce it, or satisfactorily to explain what became of it, the presumption is reasonable, and the court may infer that it still is in his possession or under his control.

As this case is here on petition to revise, the court's duty is confined to inquiring whether any error of law was committed in the court below in affirming the turn-over order. If there was no evidence upon which the order could be based this court's duty is plain and the order must be reversed. But on petition to revise the court is limited to matters of law. The facts are for the District Court. This court will not look further into the facts as found than to ascertain whether they are sustained by any substantial evidence. It is certain that in this case there was competent evidence from which the

referee and the District Judge were entitled to find that the petitioner had and still has in his possession, or under his control, assets belonging to the estate in bankruptcy, and being convinced of that fact we must hold that the turn-over was legally made.

We need not set forth any more fully than we have done what the evidence is. And from what has been already said it sufficiently appears that the inference which was drawn from that evidence is one which the law recognizes and upholds. The petitioner has had the benefit in this court of learned, able and distinguished counsel. He seems to us to have left nothing unsaid which could be fairly said on the petitoner's behalf. We have carefully examined the record. And we fully agree with the petitioner's counsel that a turn-over order should not be granted except upon the following conditions.

1. Clear proof that the title to the property sought is in the trustee, or is part of the bankrupt estate.

2. That the bankrupt, or the person directed by such order, at the date of the bankruptcy, and when the order is made, had in his possession or control, the money or property to be turned over, which had been kept and concealed from the trustee.

3. Unscheduled property traced to one, who received it before the filing of the bankruptcy petition, may be presumed to continue in such possession, until a credible explanation is made, showing what has become of such property.

The sole difficulty in this case is that in the opinion of the court below this petitioner has not given a credible explanation of what has become of the property which is a part of the bankrupt estate, and which is shown to have been in the petitioner's possession or under his control.

The order is affirmed, and the petition to revise is denied."

In re Reardon v. Pensoneau (U. S. C. C. A. 8th Cir. 1927), 9 Am. B. R. (N.S.) 519, 520; 18 Fed. (2nd) 244, is another proceeding to punish a bankrupt for failing to obey an order to turn over property.

Circuit Judge Lewis in speaking for the court, said:

"Pensoneau was adjudged bankrupt January 28, 1926, on his petition. He gave

his occupation as 'fruit and produce' and carried on a retail business of selling fruits and vegetables at 1213 North Third St., St. Louis until he quit early in November, 1925. On March 1, 1926, Reardon, as trustee for the bankrupt estate, filed his petition with the referee charging that the bankrupt had in his possession and control $8,000 as the proceeds from the sale of his stock of fruits, produce and vegetables that said sum was assets of the bankrupt estate, and prayed for an order on Pensoneau that he deliver the money to the trustee. A hearing was had by the referee before whom the bankrupt appeared and testified, and was represented by counsel. Having heard the testimony, the referee found 'That between October 19, 1925, and October 28, 1925, the bankrupt had purchased from 14 different concerns, now his creditors, goods, wares and merchandise, consisting of apples, potatoes, grapes, cabbages, celery and onions of the total value of or in the total sum of $7,577.68,' that the bankrupt admitted he received in cash for his stock between October 19 and 28 about $8,000. He accounted for $50 cash in his schedule, which was all the trustee had received. He claimed that he had lost the money in gambling. The referee after a full review of the testimony found that bankrupt then had in his possession and under his control $6,900 and entered an order that

he turn that sum over to the trustee as assets of the bankrupt estate.

By petition the bankrupt caused the action of the referee to be certified to the bankruptcy court for review where the action of the referee was, after hearing, fully confirmed in all respects, and an order was entered by the court on June 7, 1926, that Pensoneau within 10 days from that date turn over to Reardon, trustee, $6,900 in money. Pensoneau failed to comply with the order, and was cited to show cause, if any he had, why he should not be punished for contempt. He came in and the court discharged him by an order of date September 13, 1926, on the ground, as herein appears:

> 'The court doth further find that such petitioner for committment in contempt, Joseph M. Reardon, trustee in bankruptcy, has failed to establish that respondent, August Pensoneau, bankrupt herein, is at this time financially able to comply with said order of June 7, 1926, and deliver to his said trustee in bankruptcy, such concealed assets in the sum of $6,900. It is therefore by reason of the finding as last aforesaid, ordered and adjudged that the said petition of Joseph M. Reardon, trustee in bankruptcy herein, for the committment in contempt of said bankrupt, August Pensoneau, for fail-

ure to comply with such order of the court be, and such petition is hereby denied, and that said bankrupt be, and he is hereby discharged in and under such contempt proceedings.'

It will be observed that the court put the burden on the trustee, not on the bankrupt. This is the error in law of which complaint is made, and we think it well taken. The order of the referee and that of the court on June 7 each found that Pensoneau had the money in his possession or under his control when the referee's order was made in April. In the circumstances the trustee could not be expected to know what had happened since the orders were made. Pensoneau, of course, knew what he had done with the $6,900. The burden was on him, and if he could not convince the court that he had lost possession and control under circumstances which he could not prevent, he should have been held in contempt. On the facts it was twice adjudged that he had the $6,900 on a named date, and on that date, the referee ordered him to turn over to the trustee. Those were not perfunctory orders. No steps have been taken to vacate them, and we know of no reason to ignore them as not valid and binding. They establish the bankrupt's possession and control on the day the referee's order was made. The burden was on him to show what disposition had been made of

the $6,900. Until that showing is made relieving him of an intentional loss of its possession and control, it must be presumed that he still has it. Remington on Bankruptcy, 3rd Ed., Sec. 2428; In re Stavrahn (C. C. A. 2nd Cir.) 23 Am. B. R. 168, 174 F. 330; In re Weber Co. (C. C. A. 2d Cir.) 29 Am. B. R. 217, 200 F. 404; Power v. Fuhrman (C. C. A. 9th Cir.) 34 Am. B. R. 418, 220 F. 787; In re Meier (C. C. A. 8th Cir.) 25 Am. B. R. 272, 182 F. 799; Good v. Kane (C. C. A. 8th Cir.) 32 Am. B. R. 19, 211 F. 956. The two cases cited brought under consideration the question of proof in support of a turn-over order. They did not involve the issue we have here, but they are in point on the presumption that possession continues in one shown to have recently held personal chattels until he removes that presumption, and that the burden is on him to do so; and that a bankrupt can not escape an order for the surrender of property belonging to his estate 'by simply denying under oath that he has it.' See also, In re Graning (C. C. A. 2nd Cir.) 36 Am. B. R. 162, 229 F. 370.

When the bankrupt came in on the citation for contempt a hearing was had. The trustee introduced the referee's order of April 21, 1926, which directed the bankrupt to deliver the $6,900 to the trustee; also the court's order affirming the referee's order, and the trustee then testified

that none of the money had been delivered to him.

Thereupon the bankrupt testified that he did not then have the $6,900 and did not have it when the referee's order was made. Objection and exception were taken to the last statement. Over objection and exception of the trustee bankrupt was permitted to offer transcript of all evidence introduced before the referee on which the turn-over order was made. From what has been said it follows that these objections should have been sustained. The bankrupt was presumed to still have the $6,900 found by the court to be in his possession or control on April 21 preceding. His mere denial under oath did not overthrow the presumption. On the case as it stood he should have been held in contempt and punished. An order may be here entered directing the bankruptcy court to set aside the order of September 13, 1926, discharging the bankrupt and to take such further action against the bankrupt on the citation for contempt as to the court may seem meet and proper and in accord with the principles above stated."

The very last expression that this writer has been able to locate bearing upon the question at issue is found in the matter of Oriel and Confino (U. S. C. C. A. 2nd Cir. 1928), 11 Am. B. R. (N.S.) 363, 368; 23 Fed. (2nd) 409, wherein Circuit Judge Manton, in speaking for the court, said:

> "The regularity, correctness, or validity of the order disobeyed cannot be examined in this proceeding to punish. Even if it was improvidently granted or irregularly obtained, it must nevertheless be respected until it is annulled by the proper authority. Cape May R. R. Co. v. Johnson, 35 N. J. Eq. 422. The only inquiry is whether the court granting the injunction had jurisdiction of the subject-matter and of the parties, and whether the order has been violated. Therefore it was not incumbent upon the appellee in this proceeding which we hold to be a civil contempt, to establish beyond a reasonable doubt that they had the books and continued in their possession, and are wilfully refusing to turn them over. That was a matter for determination on the motion in the turn-over proceeding. In that proceeding it was determined that the appellants were able to deliver up the books in question and that they had them either in their possession or under their

> control. No appeal was taken from the order. They must be committed until they can satisfy the court that they should be purged of the contempt committed, either by compliance with the order or some remedial relief be accepted, or otherwise satisfy the court that their committment should be lifted and they be released. Kirsner v. Taliaferro (C. C. A., 4th Cir.) 29 Am. B. R. 832, 202 F. 51."

From the cases cited, the rule of law is definitely deduced that upon a contempt proceeding where the court has before it the findings and order of the referee which stand as a final order that the burden is upon the bankrupt to offer positive proof to explain to the district court the reason for his failure to obey the valid order of the referee.

In the instant case the record before the court was that the bankrupt had the sum of $5,377.37 in her possession. Further that she did not pay this money over to her trustee as expressly ordered and required. The mere

statement by the bankrupt in her answer to the rule to show cause "that she is wholly and completely financially embarrassed and has been for some time past, physically disabled" was as the cases indicate not proof sufficient to justify her being purged of contempt.

It was accordingly error for the District Court to sanction the disobedience of the bankrupt and purge her of her contempt.

CONCLUSION

In view of the simple questions involved, namely, the District's Court misinterpretation of the findings and the court's examination into the same and the order based thereon, which matter was before the court on a contempt proceeding and not on a review, and the purging of the bankrupt from said final order upon which there was no attempt of any kind made to justify her disobedience has led the appellant in this brief to forego any detailed argument of his own and to rest

the matter almost entirely on the decisions as rendered by the various Circuit Courts of Appeal that have passed upon this question. The appellant is impressed with the force of the reasoning that if the findings and order were not justified or invalid the way to correct the same was by review and not by disobedience. When the matter came before the District Court on a contempt proceeding, the question for the Court was,—is the bankrupt in contempt of the referee's order and not is the order of the referee valid.

Respectfully submitted,

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No. 5500

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE P. CLARK, Trustee in Bankruptcy of the Estate of EDNA G. MILENS,

Appellant,

vs.

EDNA G. MILENS,

Appellee.

Brief of Appellee

Upon Appeal from the United States District Court for the District of Oregon.

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STATEMENT OF THE CASE

In the Transcript of Record herein, prepared and filed by appellant, there are set out copies of Record involved, in part, in this cause, to-wit:

"Answer of Bankrupt to Rule to Show Cause Why Edna G. Milens Should Not Be Punished for Contempt for Failure to Obey Order ..... (Trans. 9)

Assignment of Error..... (Trans. 24)

Citation on Appeal.... ..... (Trans. 20)

Findings of Referee..... (Trans. 9)

Opinion (Oral)..... (Trans. 14)

Order Allowing Appeal Without Bond.... .....(Trans. 26)

Order Purging of Contempt.....(Trans. 18)

Order Requiring Edna G. Milens to Turn Over to Her Trustee Assets Unaccounted for to Such Trustee .....(Trans. 3)

Petition for Order Allowing Appeal from An Order Made By the District Court of the United States for the District of Oregon Purging Edna G. Milens of Contempt.. .....(Trans. 22)

Referee's Certificate re Alleged Contempt.. .....(Trans. 1)

Rule to Show Cause re Contempt..(Trans. 7)

Hence, Appellee does not deem it of any good purpose to again re-write such Records verbatim herein.

Appellant, in his brief, predicates his appeal in this cause upon an alleged error of the Honorable District Judge, Robert S. Bean, in dismissing contempt proceedings instituted against the bankrupt herein, Edna G. Milens, and purging her of contempt.

Under the head of "Specifications of Errors," as shown on page six (6) of Appellant's Brief, it is claimed in substance as error on the part of the trial court:

THE FIRST ERROR ALLEGED is the failure of the District Court of the United States for the District of Oregon to accept and adopt the findings and order of the Referee based thereon requiring the bankrupt to turn over to her trustee, money in

her possession wilfully and unlawfully concealed by her from her trustee in bankruptcy from which findings and order of the Referree, no review or appeal was taken by the bankrupt and which, as a consequence thereof, became a final judgment.

THE SECOND ERROR ALLEGED is the making of the order by the District Court of the United States for the District of Oregon purging the bankrupt of contempt for her refusal to obey a final order requiring her to pay to her trustee in bankruptcy, the sum of $5,377.37, found to be in her possession and wilfully and fraudulently withheld from her trustee, although the bankrupt offered no testimony, made no showing and called no witnesses in the contempt proceeding.

In discussing these alleged errors, it seems proper to consider them under the head of "Argument," as there is really, as appellee views it, but one question involved, and that is, the right of the District Judge, the Honorable Robert S. Bean, to consider said cause generally. It is contended by appellant's counsel that the only question that the District Court could consider and pass upon was, "What had the defendant, bankrupt, done with the money that she had been declared by the Referee to have in her possssion since the time the order making that Finding was signd?" In other words, appellant contends the trial judge could not consider the Findings of the Referee with other records of the case as to the questions of fact, but

that Findings are to be held to be conclusive and limit the inquiry to the acts of the bankrupt (appellee) subsequent to said Findings.

Under such theory, it is contended by counsel for appellant:

(1) That as a matter of course, under the Bankrupt Law and proceedure, Bankrupt was guilty of contempt of Court.

Considering carefully the opinion of the trial judge, the Honorable Robert S. Bean, on the question of Appellee's alleged contempt, as set forth in the Transcript of Record (Trans., p. 14) and weighing the logic and reason naturally inherent therein, it appears to counsel for appellee to be in itself conclusive and complete, answering all the argument of appellant and harmonizing with the law and the weight of decisions in proceedings of this nature.

A careful analysis of the entire record, as shown in the Transcript, including the Referee's Report, will disclose, we submit, inherent defects in the Findings, rendering such insufficient to warrant sustaining a contempt proceeding upon the grounds claimed by appellant.

The Findings are indefinite and uncertain:

(1) As to the specific sum of money in the hands of the bankrupt at the time the order of the Referee was made.

(2) As to whether this money which came into the hands of the appellee during the period of

bankruptcy prior to the making of the order was the specific fund that belonged to the bankrupt estate.

(3) As to whether any funds were in the physical possession of the bankrupt at the time the order was made.

(4) As to whether she wilfully and fraudulently refused to pay the same over to the Trustee.

The trial Court, in a bankruptcy proceeding, is clothed with a discretion THAT COURTS HAVE A RIGHT TO EXERCISE IN USING THEIR EXTRAORDINARY POWER IN CONTEMPT PROCEEDINGS, WHICH MUST BE A FREE AND BROAD DISCRETION. It cannot, in the nature of things, be hampered and restrained and restricted by the decisions of other Courts to any very great extent. It is not regulated by statute. It is a power inherent in the Courts to be exercised by the particular judge who may feel that this power is necessary in the particular case and must be exercised in each case as the then presiding Judge in such Court and cause views the facts to the end that the dignity and efficiency of the Court in any particular action should be upheld.

It must necessarily be, to a very large extent, a matter of discretion with the trial judge before whom the matter is heard, and it must so clearly appear to such particular Court then considering the instant records and facts that this extraordi-

nary power should be exercised, and the Court must be satisfied of the facts set forth by the record, including the Referee's Findings, that the same are applicable to the particular case, and, that there is no reasonable doubt as to the matters of alleged contempt charged, viz:

(1) That the bankrupt or appellee had in her possession at the time an order was made, the particular and specific sum of money, and

(2) Had the physical ability to turn the same over to the Trustee, and

(3) Wilfully and fraudulently refused to do so.

Naturally, we submit, appellant Courts will hesitate to pass upon and reverse the decision of a trial Court in a matter of contempt proceeding which the trial Court, in exercising its inherent right and conscience and discretion alone has found the record insufficient to call forth an exercise of such extraordinary power.

Will the appellant Court, in a contempt proceeding, as the instant case, in a proceeding that lies solely within the consideration of the trial Court, solely within the conscience of the Court, exercised by the Court for the purpose of maintaining the dignity and efficiency of this particular Court, find this appellee guilty of contempt on a showing of such a character as the record herein discloses without giving her the benefit of the fact that REASONABLE DOUBT DID OR COULD ARISE herein in its exercise of this ex-

traordinary power to meet the ends of justice? We believe not. We believe it appears from the record in said cause that no such a clear case is made out by the appellant as would warrant this Court to reverse the order of the District Court made and entered herein.

We submit that unless the appellee in bankruptcy in a contempt proceeding instituted against her:

(1) Has a specific fund or specific property in her possession, and

(2) Can turn the same over to the Trustee for the benefit of the bankrupt estate,

. . . the contempt proceeding can avail nothing to the creditors of the estate. Appellee submits that a charge of contempt is, in all such cases, a vindictive and near punitive proceeding and should be denied in all cases where the trial Court in contempt proceedings is convinced that punishment for contempt, as asked for by appellant herein, IS AN APPARENT ATTEMPT TO COLLECT FROM APPELLEE A DEBT FOR THE CREDITORS.

Appellee submits that the Court will seldom exercise this extraordinary power to punish for dereliction of duty, nor to compel the doing of an act by a person which act is beyond such person's physical ability, but will generally leave such cases to other departments of civil or criminal law where the defendant may have the right of trial by jury, and, as it appears from the record, as was

found in this case by the Honorable Robert S. Bean, District Judge, that it appears from the Findings of Fact as shown by the Referee's Report THAT THIS CLAIM CAN BE NO MORE THAN A DEBT; HENCE, CONTEMPT PROCEEDINGS WILL NOT BE SUSTAINED, FOR IN THIS COUNTRY, THE TIME HAS LONG PASSED WHEN A DEBTOR MAY BE PUNISHED CRIMINALLY FOR THE FAILURE TO PAY A DEBT, and the contempt proceeding asked against said appellee, as charged by appellant herein, would, in the nature of things, be a means of depriving said appellee of her right of trial by jury.

AUTHORITIES

It is generally conceded in view of constitutional or statutory provisions forbidding imprisonment for debt, that Courts have held that disobedience to an order to pay money pursuant to a judgment or decree or an order in the nature of a judgment or decree, cannot be punished as a contempt.

Nelson vs. Hill, 89 Fed. 477.
Mallory Mfg. Co. vs. Fox, 20 Fed. 409.

Contempt will not lie for failure to comply with an uncertain or indefinite order. In order to be valid and binding, the order must be certain or definite in its terms. A charge of contempt cannot be established for failure to comply with

uncertain or indefinite orders, judgments, or mandates.

Privett vs. Pressley, 62 Ind. 491.

Riclay vs. Whitcher, 18 Ind. 458.

Moore vs. Smith, 72 N. Y. App. Div. 614; 74 N. Y. Suppl. 1089.

Refusal to deliver property to a receiver, where the property is not properly designated, is not contempt.

Casselar vs. Simons, 8th ~~page~~ Paige (~~N. W.~~ N. Y. 273).

Where it appears or was impossible to comply with an order without fault on the part of the one charged, there is no contempt.

Ex. P. Overend, 122 California, 201; 54 Pac. 740.

Walton vs. Walton, 54 N. J. Eq. 607; 35 Atl. 289.

In the Matter of Ockhershausen, 59, Hun, 200, 13 N. Y. Suppl. 396.

Disavowal of any intention to commit a contempt may, however, extentuate, or even purge a contempt.

In re Perkins, 100 Fed. 950.

Vose vs. Internal Imp. Fund, 28 Fed. Cas. No. 17,008.

The appellant in this case, we submit, is wholly wrong in his theory of his right to have appellee adjudged in contempt. An applicant is not entitled as a matter of right to an order for the commitment of a person for contempt.

People vs. Durant, 116 Cal. 179; 48 Pac. 75.

The application is addressed to the discretion of the Court.

Ex. P. Beebees, 3 Fed. Cas. No. 1220.

Joyce vs. Holbrook, 2 Hilt (N. Y.) 94; 7 Abb. Pr. (N. Y.) 338.

Where the matters of contempt as charged have been finally adjudicated and the defendant discharged, or where the former punishment inflicted was un-authorized, he cannot be again tried with the same offense.

Eaton Rapid vs. Horner, 126 Mich. 52; 85 N. W. 264.

Appellee contends that in this light, the appellant, in attempting to perfect an appeal in this case, is, in substance, attempting to have appellee tried twice on the matter of contempt and is endeavoring to have the matter of contempt brought before and determined upon again by this Court, when as a matter of fact, Appellee contends the matter of the alleged contempt originally, solely and finally rest within the jurisdiction of the Dis-

trict Court alone, presided over in the instant case by Judge Robert S. Bean, and appellee submits that the order and opinion by Judge Robert S. Bean, in the following words and figures, to-wit:

"(Title of Court and Cause.)

OPINION (ORAL).

Portland, Oregon, April 23, 1928.

R. S. BEAN, District Judge.—In this matter, Mrs. Milens was adjudged a bankrupt on the 3d of December, 1926. On the 21st of January of the following year, on the hearing of a petition of the Trustee for an order requiring her to turn over to him certain property, the Referee found that during the year 1926 the bankrupt had received in cash from the sale of merchandise between $17,000 and $18,000, and had paid out for expenses and purchases, money and checks, the sum of $13,000, leaving a balance of about $5,000.00, which the Referee found that the bankrupt, although given an opportunity, had failed to account for, and that she had that in her possession at the time of the adjudication and at the time of the order. He thereupon entered an order requiring her to pay over this amount of money to the Trustee within a given time, and the order was served upon the bankrupt, and upon her failure to comply with it, the facts were certified to the Court, and an order made requiring her to appear and show cause why she should not be punished for contempt. For answer to the show-cause order, the bankrupt says that she did not at the time the order was made by the Referee and does not now have possession of the money or any part thereof, and is therefore unable to comply with the order.

Now there is a decided conflict in the authorities as to how far, if at all, the Court, in a proceeding for contempt for failure to comply with the terms of the order, may go behind the findings of the Referee and examine into the merits of the case, one line of authorities holding that the Referee's findings are conclusive, and that the only question for the Court in a contempt (17) proceeding for failure to comply therewith, is to inquire what the bankrupt has done with the property since the order of the Referee, and whether she had present ability to comply with it. Another line holds that in a contempt proceeding, the Court may go back of the order of the Referee and examine the facts. The practice seems to have been considered more fully by the Circuit Court of Appeals of the Third Circuit than elsewhere, and the rule there is that in a contempt proceeding, there are two steps: first, the finding of the Referee that the bankrupt had possession of the property which he was ordered to turn over, and that such order is final unless reviewed, and, second, a proceeding for contempt, in which the only question is whether the bankrupt is then physically able to comply with the order previously made. *But whatever the true rule may be, the Court may, of course, examine the finds and order of the referee to determine whether or not it warrants the extraordinary power of punishing* as for a contempt. The findings of the Referee are not *that the bankrupt had in her possession any specific money or property belonging to the estate*, which she was ordered to turn over to the trustee, but rather that she had received a certain sum of money during a given period, and was able to account for only a part thereof to the satisfaction of the Referee, and there-

fore, that she must have the balance in her possession. These findings would probably be sufficient to justify, in a proper proceeding, a judgment against the allaged bankrupt for the balance, but are they sufficient to justify her punishment by imprisonment for contempt? I think not. The Bankrupt Act requires the Referee to certify the facts to the Court, *and the Court to examine into the matter, and if, in its judgment, the evidence is sufficient to proceed as for a contempt, but this statute does not invest the court of bankruptcy with superior powers to punish for contempt than is vested in the courts generally.* What is legally sufficient to purge a contempt in other courts is sufficient in a like contempt in the bankruptcy court. The bankruptcy court may (18) punish for contempt for failure to comply with a turnover order, provided the bankrupt has the property in his possession or under his control. The power to punish for contempt is an extraordinary power and should be carefully exercised and only when its propriety is beyond reasonable doubt. It should appear that there has been a wilful disobedience of the order, and that the party complained of has acted in bad faith for the purpose of evading the order. The law makes ample provision for the punishment of the bankrupt for fraudulently concealing his property or false swearing, and there is therefore no reason for a Court to imprison a bankrupt for the purpose of compelling him to turn over property in doubtful cases. It should not be used and cannot be used for the purpose of enforcing the payment of a debt. Before resort should be had to this proceeding, it should clearly appear that the bankrupt actually had in his physical possession or under his control some specific money or property belong-

ing to the estate, which he was ordered to turn over to the trustee, and which he wilfully refused to do. One Judge has said that the property should be specifically identified to enable the marshal to take it into his possession. It is not enough, as I understand, that through some process of reasoning the bankrupt may be held liable. The effect of the findings and order of the referee in this case is that the bankrupt has not accounted for all the money received by her, and is therefore liable to the estate for the difference. To imprison her on that account would be to imprison her for a debt which is, of course, unthinkable.

So I take it that under this record an order discharging the bankrupt should be made.

Filed June 15, 1928, as of April 23, 1928.(19)

"(Title of Court and Cause.)

ORDER PURGING OF CONTEMPT

Said cause having come on for hearing before the above-entitled court on Monday, the 16th day of March, 1928, upon rule to show cause why Edna G. Milens should not be punished for contempt for failure to obey lawful order, said Edna G. Milens appearing in person and by her counsel, James H. McMenamin, and the trustee in bankruptcy herein being represented by Coan & Rosenberg, attorneys at law, and the Court having heard the argument of the respective parties, and having taken said matter under consideration, and being fully advised in the premises, does now

ORDER, That said contempt proceedings against said Edna G. Milens be, and the same

are hereby dismissed and she is purged of contempt in said cause.

(Signed) R. S. BEAN, *Judge.*

Filed April 28, 1928. (21)

discharging this contempt matter against Appellee, is final and conclusive, and is in the nature of an acquittal in a criminal cause and that no appeal lies therefrom.

Contempt proceedings against a party to punish him for a contempt of the authority and dignity of the court are considered to be in the nature of criminal proceedings.

New Orleans vs. New York Mail Steamship Co., 20 Wall. 387; 22 L. Ed. 354.

Accumulator Co. vs. Consolidation Electric Storage Co., 53 Fed. 796.

Goodrich vs. U. S., 42 Fed. 392.

Kirk vs. Milwaukee Dust Collector Mfg. Co., 26 Fed. 501.

In the present case, appellant predicates the proceeding for contempt wholly upon the Finding of the Referee, which Appellee submits were not the result of any conflict of testimony and which Appellee contends are wholly without facts to sustain same in the record. It does not appear that any witnesses appeared before said Referee to testify that said Appellee had assets she would not turn over to the Trustee. Appellee's testimony in said cause is indisputed on the point that she did not have any funds or moneys. The District Court

in passing upon the Record herein, including the Findings of Referee, is in no sense bound by the Referee's Finding, because the District Judge, having the facts before him, could make, and did make, the deductions for himself and those deductions announced in the opinion of Judge Bean, Appellee contends must necessarily stand as the decision of that particular District Court and as the ultimate pronouncement and final determination on the matter of the alleged contempt.

> "Ordinarily, the review by the judge of an order made by the Referee will be confined to the errors pointed out in the petition for review, but the judge may proceed to consider any point presented by the record then before him, whether such point was or was not discussed before or by the Referee:
>
> Vol. 1, Loveland Bankruptcy, pp. 225-6.
>
> *In re Samuel Wilde's Sons* (C. C. A. 2nd Cir.), 114 Fed. Rep. 972; 75 C. C. A., 601, 16 Am. B. R. 386.
>
> *In re Gottardi,* 114 Fed. Rep. 328; 7 Am. B. R. 723."

> "The judge reviews both law and fact. No fixed rule can be laid down with reference to the weight to be given by the judge to the finding of fact by the Referee in making his ruling or order. Much depends upon the character of the finding. As observed by Judge Lurton, 'IF IT BE A DEDUCTION FROM ESTABLISHED FACT, THE FINDING WOULD NOT CARRY ANY GREAT WEIGHT, FOR

THE JUDGE, HAVING THE SAME FACTS, MAY AS WELL DRAW INFERENCES OR REDUCE A CONCLUSION AS THE REFEREE.'

"Vol. 1, Loveland Bankruptcy, pp. 225-6.

In re Samuel Wilde's Sons (C. C. A. 2nd Cir.), 114 Fed. Rep. 972, 75 C. C. A. 601, R. B. 723."

In re Gottardi, 114 Fed. Rep. 328, 7 Am. B. R. 723.

We also call the Court's attention to Chapter Two (2) of the Bankruptcy Act of 1898, wherein powers and jurisdiction of District Courts in Bankruptcy are defined, sub-division ten (10) thereof, being as follows:

(10) TO CONFIRM, Etc., REFEREE'S FINDINGS. *Consider and confirm, modify or over-rule, or return, with instructions for further proceedings, records and findings certified to them by referees.*

. . . and also, the last paragraph of said Chapter Two (2), giving District Courts additional powers, the language of which is entitled "Unspecified Powers," empower a District Court, sitting in Bankrupt matters with additional authority, the language therein being:

"Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Vol. 1, Loveland on Bankruptcy.

ARGUMENT

The appellant herein has cited in his brief 42 cases. We submit to the court that the cases cited and the ruling therein made are clearly and completely distinguishable from the case at bar, and that no ruling announced by any of said cases submitted by appellant over-rules, modifies or qualifies the opinion rendered and decision made and handed down by Judge Robert S. Bean in the instant case (see opinion, Tran., p. 14 and Order, Tran., p. 18). We do not believe that a further or extended discussion on this point pertaining to cases cited by appellant would be of any assistance to the Court, as the Court will readily appreciate, we believe, what we have herein last said, upon investigating the decisions noted in appellant's brief.

Appellee raises the point herein THAT SAID APPELLANT IS WITHOUT WARRANT OR AUTHORITY IN LAW TO PREDICATE OR PROSECUTE AN APPEAL FROM THE ORDER OF Judge Robert S. Bean upon facts and record as in this instant case and we ask the Court to distinctly pass upon this point.

At common law, the exercise by a Court of competent jurisdiction of the power to punish for contempt cannot be reviewed. Every court is the exclusive judge of a contempt committed in its presence or against its process.

Hayes vs. Fischer, 102 U. S. 121, 26 L. Ed. 95.

New Orleans vs. New York Mail Steamship Co., 20 Wall. 387, 22 L. Ed. 354.

McMicken vs. Perin, 20 How. 133, 15 L. Ed. 857.

Sessions vs. Gould, 63 Fed. 1001, 11 C. C. A. 550.

King vs. Wooten, 54 Fed. 612, 4 C. C. A. 519.

In re Mason, 43 Fed. 510.

In the absence of statutory regulations, the matter of dealing with contempt and when and how they shall be punished are within the sound discretion of the trial Court, and unless such discretion is grossly abused, the decision must stand.

Clark vs. People, 12 Am. Dec. 177.

Brown vs. Brown, 58 Am. Dec. 641.

Murray vs. Berry, 18 S. E. 78.

Bagley vs. Scudder, 33 N. W. 47.

CONCLUSION

We conclude herein by calling the Court's attention particularly to the language of the Supreme Court of Oregon, in *Re Newhouse vs. Newhouse,* 14 Ore., pp. 292-93, wherein the Court said, among other things:

> "Mistake, misfortune, inability from poverty, or other equivalent cause, when shown to exist, have always been held in equity a sufficient excuse for non-payment of money, or failure to comply with an order, and to purge the con-

tempt. To the prayer originating in such cause, equity will lend a listening ear, and grant such relief as the merits of the facts authorize."

Appellee submits that the appeal of appellant herein should be dismissed with prejudice upon the record.

Respectfully submitted,

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Attorneys for Appellee.

STATE OF OREGON, }
County of Multnomah } ss.

I hereby certify that the foregoing is a true and correct copy of the original thereof.

James H. McMenamin
Of counsel for Appellee.